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IN THE

Supreme Court of the United States

October Term, 1967

No. 1118

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, suing on behalf of all of the savings shareholders of said association as a class; and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and N. JOSEPH ROSS, Intervenor in the District Court,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation and agency of the United States; SAVINGS AND LOAN COMMISSIONER OF THE STATE OF CALIFORNIA; EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, a citizen of New York; MARION FIELDS, a citizen of New York and RALPH FIELDS, a citizen of New York.

Respondents.

Petition of Long Beach Federal and Its Shareholders' Protective Committee, Etc., for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation and agency of the United States; SAVINGS AND LOAN COMMISSIONER OF THE STATE OF CALIFORNIA; EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, a citizen of New York; MARION FIELDS, a citizen of New York and RALPH FIELDS, a citizen of New York.

Respondents.

Petition of Long Beach Federal and Its Shareholders' Protective Committee, Etc., for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners[1] pray that Writs of Certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in three consolidated cases before that Court on its August 18, 1967 opinion.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit was filed August 18, 1967, and is not yet reported. A true copy of said Court of Appeals opinion and judgments is Appendix "A" of the Petition for Certiorari by Intervenor Ross filed concurrently herewith.

The opinion of the District Court (which is also its findings of fact and conclusions of law under F.R.C.P. Rule 52) was filed September 22, 1964. It is reported at 233 F. Supp. 578. A true copy thereof is Appendix I attached hereto.

Parties

[1]Petitioners are Long Beach Federal Savings and Loan Association (Long Beach Federal) and Elliott, *et al.*, as the Shareholders' Protective Committee of Long Beach Federal, and Intervenor Ross.

Long Beach Federal is a *mutual* federal savings and loan association owned solely by its 60,000 savings depositors who are called shareholders.

Elliott, *et al.*, are the Shareholders' Protective Committee of said association holding the proxies of, and representing a majority of, said 60,000 savings depositors. Said Shareholders' Protective Committee was organized 21 years ago in 1946 when Long Beach Federal was first seized by the predecessors of respondents Federal Home Loan Bank Board, *et al.* It has since litigated continuously before courts and Congressional Investigating Committees to save Long Beach Federal from repeated seizures and destructive liquidation by respondents. Said Protective Committee has been continuously licensed by the State of California each year for the past 21 years since 1946. Said

GROUNDS OF JURISDICTION.

An opinion of the Court of Appeals for the Ninth Circuit directing reversal of the judgments below was filed on August 18, 1967. Timely applications for leave to file "Appellees' Petition For Rehearing Or Clarification and Suggestion for Hearing En Banc" were filed on September 14, 1967. An order of said Court of Appeals granting leave to file said petitions for rehearing, etc., was made and filed September 20, 1967.

On November 27, 1967, the Court of Appeals ordered respondent Bank Board to file a response to said Appellee's petition for rehearing. Said response was filed December 26, 1967.

Another order of said Court of Appeals was made on January 12, 1968. It again granted Appellee's leave to file said Petition for Rehearing. It also permitted peti-

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Committee was recognized by this Court 20 years ago in *Fahey v. Mallonee*, 332 U.S. 245, 91 L. ed. 2030 (1947) discussed hereafter at page 39.

Respondents include Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation and California State Savings and Loan Commissioner. Said Insurance Corporation is operated and controlled solely by said Board. Said California Savings and Loan Commissioner is the California regulatory counterpart of said Bank Board. The Commissioner's authority is limited, however, to *only* California State savings and loan associations.

All said respondents are expressly "sue and be sued" agencies. They are subject to suit and judicial review by the respective federal laws creating said Bank Board (12 U.S.C. §1464-(d)) and Insurance Corporation (12 U.S.C. §1725(c)(4)) and the California State law creating Savings and Loan Commissioner (California Financial Code §5258).

Equitable Savings and Loan Association is a California State guarantee stock association. It was a plaintiff in the District Court and an appellee in the Court of Appeals. It is not a petitioner, but is a respondent here.

Intervenor N. Joseph Ross is a savings depositor who intervened in the actions in the District Court and was an appellee. He is filing his separate Petition for Certiorari.

tioner's to reply to said Bank Board's response to petition for rehearing. The order of January 12, 1968 denied said petition for rehearing.[2].

Jurisdiction of This Court on certiorari is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. UPON A "DISSOLUTION BY MERGER" OF THEIR *MUTUAL* FEDERAL SAVINGS ASSOCIATION MUST THE ASSOCIATION'S SAVINGS DEPOSITORS FORFEIT THEIR FEDERAL STATUTORY AND CHARTER RIGHTS TO EQUAL AND PRO RATA DISTRIBUTION UNLESS THEY FILE "STRIKE SUITS" TO ENJOIN AND WRECK SUCH MERGERS *BEFORE* THEY CAN TAKE PLACE?

OR CAN THEY BE HEARD ON THE MERITS OF THEIR RIGHTS IN U.S. COURT ACTIONS FILED BY THEM ONLY ONE BUSINESS DAY AFTER FINAL APPROVAL OF SAID MERGER BY RESPONDENTS BANK BOARD, *ET AL.*?

Importance of the Question.

The more than twenty million (20,000,000) people who are mutual savings depositors in 2051 federal savings and loan associations own their seventy billion dollars ($70,000,000,000) of savings deposits and as-

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[2]There were three seperate actions in the U.S. District Court. They were consolidated for trial, etc. Three separate judgments were entered by the District Court. The appeals were consolidated for briefing and argument. A single opinion was filed by the Court of Appeals but three separate judgments are required in the Court of Appeals. Pursuant to Rule 23-5 of this Court Petitioners Elliott, *et al.*, and Long Beach Federal are filing a single petition for certiorari and Petitioner Ross is also filing a single but separate Petition for Certiorari. His Petition outlines the procedural steps in each of the three actions.

sets.[3] They have the federal statutory right to "equal and pro rata" distribution of the net assets of their mutual federal savings associations. Such rights are given them by the Acts of Congress authorizing the creation of such federal associations and also by the federal association's charters.

2. ARE U.S. COURT JUDGMENTS WHICH HELD RESPONDENT BANK BOARD'S RETROACTIVE AND *EX PARTE* FORFEITURES WERE "ILLEGAL AND VOID . . . ARBITRARY AND CONTRARY TO, AND WITHOUT AUTHORITY IN, LAW" ENFORCEABLE AGAINST BANK BOARD *ET AL.*, ONLY TO THE EXTENT *IF ANY*, THAT SAID BANK BOARD, *ET AL.*, MAY "APPROVE" SAID U.S. COURT ORDERS?

OR DO THE U. S. COURTS HAVE POWER TO COMPEL RESPONDENTS TO STAY WITHIN THE EXPRESS TERMS OF SAID ACTS OF CONGRESS AND FEDERAL CHARTERS?

Importance of the Question.

Respondents, Federal Home Loan Bank Board, *et al.*, are subject to suit and to judicial review ". . . including declaratory judgments or writ of prohibitory or mandatory injunction . . ." to compel agency action unlawfully withheld.[4] The U.S. District Court only ordered

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[3]Figures are estimates taken from Federal Home Loan Bank Board 1966 Source Book and 34th Annual Report and 1965 Savings and Loan Fact Book of the United States Savings and Loan League.

[4]Administrative Procedure Act, 5 U.S.C. §1009(c) and (e) (now 5 U.S.C. §§704 and 706); Also 12 U.S.C. §1464(d). Respondent California Savings and Loan Commissioner is also ". . . subject to judicial review in accordance with law". California Financial Code §5258 (See pp. 28-31 hereof for texts of said sections).

enforcement of the express terms of the Acts of Congress and petitioners' charter which both require "equal and pro rata distribution."

The Court of Appeals assumed that the forfeitures were invalid (Opn. p. 17). But yet held the U.S. District Court ". . . was without power to remedy [the invalid forfeitures] . . . without the administrative approval required by state and federal statutes and regulations . . ." (Opn. p. 17).

Thus, the constitutional and statutory powers of United States Courts to correct unconstitutional, illegal and void administrative action are destroyed without discussion.

Nowhere in its 21 page opinion does the Court of Appeals cite or discuss the Administrative Procedure Act.

The Court of Appeals gives respondent Bank Board a veto power over every United States trial or appellate court decision affecting the distribution of any federal savings and loan association's reserves and surplus among its thousands of mutual savings depositors.

Constitutional and Statutory Provisions.

1. Amendment 5 United States Constitution
   "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . ."
2. Title 12 U.S.C.A. §1464(a); (b); (d)(1) part only; (i)
3. Title 5 U.S.C.A. §1009(c)(e) Now Title 5 US.C.A. §701(a); §704 and §706.
4. Title 12 U.S.C.A. §1725(c)(4) part only
5. 12 C.F.R. Part 546.4
6. California Financial Code §5258; §9204.

For texts see Appendix II hereof.

STATEMENT.

The actions below were brought by petitioners, *et al.*, to save about $9,500,000 of petitioners surplus from certain arbitrary and void forfeitures imposed retroactively by respondents Bank Board, *et al.*, in violation of applicable Acts of Congress and the Federal Charter of petitioner Long Beach Federal [1R-1-28; 2R-7-29; 3R-2-17].[5]

The disputed $9,500,000 was deposited in the U.S. District Court.[6] Respondents thereafter agreed to consent judgments for the distribution of about $7,000,000 thereof among petitioners' 60,000 mutual savings depositors. Such distribution was made pro rata as required by said charter and Acts of Congress. The balance of $2,500,000 remained in Court [1R-204-213; 2R-260-270; 3R-180-190; 1R-316-319; 2R-331-335; 3R-307-311; 3R-167-179].

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[5]For uniformity of record references among all briefs, appellees will use the same record references as in their briefs to the Court of Appeals, *i.e.*, the original papers in No. 20378 (D.C. No. 62-1072-PH), No. 20447 (D.C. No. 63-1230-PH), and No. 20522 (D.C. No. 63-1107-PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr." See footnote 10, page 10 hereof for description of how references are made to the opinion of the Court of Appeals and the District Court.

[6]All figures are approximate. The $9,500,000 was in the form of a single certificate for 791,650 shares of Equitable guarantee stock value in 1963 at $9,500,000. See footnote 12, page 11 hereof for details.

Congressional Committee and the District Court Condemn Bank Board's Retroactive Forfeitures as Arbitrary and Illegal.

A Congressional Investigating Committee said of respondent Bank Board's seizures made to block distribution of petitioner's surplus:

> ". . . the Board's . . . actions must be characterized as arbitrary and unlawful and of the most reprehensible sort. . . . by preventing the conversion the board deprived the Association of a right created by . . . Congress . . . Without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power. . . ."[7]

The District Court also held respondents' retroactive forfeitures were "illegal and void . . . arbitrary and contrary to, and without authority, in law." (233 F. Supp. 578 at p. 598 Appx. I). It ordered enforcement of the Acts of Congress and petitioners charter both of which it held were violated by said forfeitures.

Bank Board's Retroactive Forfeitures Are Imposed to Punish Thousands of Small Savings Depositors Because They Would Not Agree to Forfeitures of Larger Depositors.

Respondent Bank Board for nearly a year threatened to impose its retroactive forfeitures only on petitioners savings accounts of over $100,000 each (233 F. Supp.

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[7]The Congressional Committee had heard the sworn testimony of respondent Bank Board's then Chairman, Members, Counsel and staff. Said Committee's full report is Appendix III to petitioner's briefs in the Court of Appeals.

578 at p. 585 Appx. I). There were about 54 such accounts.

Petitioners refused to agree to the forfeitures. In an effort to coerce agreement, respondent Bank Board refused to permit *any* distribution to *any* of petitioners 60,000 savings depositors regardless of the size or age of their savings accounts.

Petitioners yet refused to yield.

Respondent Bank Board then increased its retroactive forfeitures to include all new savings accounts of over $10,000 each, and all savings accounts which were pledged for a loan anywhere. There were thousands of such savings accounts (233 F. Supp. 578 at p. 585 Appx. I).[8]

Respondent Bank Board's 1963 Chairman McMurray admitted in a letter to petitioner Long Beach Federal that the Board expanded its retroactive forfeitures only because petitioners did not yield to the Board's initial forfeitures.[9]

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[8]The Bank Board gave no notice of any of its retroactive forfeitures until months after the new savings deposits were made (See p. 18 hereof for details)

[9]Board Chairman McMurray said:

> "You persist in saying that the Board is only interested in eliminating accounts of $100,000 and over from participating in the distribution. . . . the $100,000 figure was used only for the purpose of arriving at a mutually agreeable compromise which I thought we had reached . . . You chose not to implement the compromise. That being the case, as you were advised, the Board's concern with the 'free-rider' problem is not limited to accounts of $100,000 and over." (Extract from May 15, 1963 letter from the Board to Long Beach Federal) [Pltf. Exs. 21-41].

The Court of Appeals Holds United States Courts Without Power to Remedy Invalid and Illegal Forfeitures.

The Court of Appeals without considering the legality or merits of any of the retroactive forfeitures, reversed and ordered the actions dismissed. It said:

> ". . . the district court is without power to formulate and enforce a new distribution plan free and clear of Board and Commissioner approval . . ." (CA-9 Opn. p. 20).[10]

The judgment of the District Court was for equal pro rata distribution in the exact terms of the Acts of Congress and petitioners' charter. It was not a new distribution plan. The Court of Appeals held that the U. S. Courts are *without power* to make *any* judgments on the Bank Board's illegal forfeitures, or to enforce Acts of Congress repealed and violated by respondents, except such judgments, if any, as respondents Bank Board, *et al*, might approve.[11]

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[10]References to the Court of Appeals Opinion will be "Opn. p. ...." or "CA-9 Opn. p. ....". Said Court of Appeals opinion is Appendix "A" attached to the petition for certiorari of N. Joseph Ross filed concurrently herewith. References to the District Court opinion will be "233 F. Supp. 578 at p. .... Appx. I". It is Appendix "I" attached to *this* petition for certiorari. All petitioners respectfully request this court to consider both said petitions together. Various statements and contentions made in one are not repeated in the other.

[11]The Court of Appeals assumed that respondent Banks Board's forfeitures were invalid. The Court said:

> ". . . what remedy was available, *assuming that the district court was correct* in determining that the restrictive distribution provisions [forfeitures] . . . *were invalid.* . . ." (CA-9 Opn. p. 17). (emphasis added).

The Court held no remedy existed and said:

> ". . . without reaching the several other complex questions raised on these appeals, the judgments are reversed, and the cases are remanded with directions to dismiss the actions. . . ." (CA-9 Opn. p. 21).

The Court of Appeals also held petitioners *only* recourse against respondents' retroactive forfeitures was to try to enjoin the merger before it took place (CA-9 Opn. p. 21).

But if there were no merger then petitioner's $9,500,000 of surplus could not be distributed among petitioner's 60,000 savings depositors. To enjoin the merger would prevent any distribution.

Respondents' retroactive forfeitures were imposed as conditions of respondents approving a merger of petitioner Long Beach Federal into respondent Equitable (233 F. Supp. 578 at p. 598 Appx. I).

Said $9,500,000 became available for distribution as a result of said merger.[12]

Both Long Beach Federal's charter and the express terms of the Acts of Congress require *equal* and *pro rata* distribution of said $9,500,000 of net worth and surplus of petitioner Long Beach Federal among *all* its 60,000 mutual savings depositors.[13]

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[12]By merger of Long Beach Federal into Equitable, Equitable assumed all Long Beach Federal liabilities. Long Beach Federal's 60,000 savings depositors each received new savings accounts from Equitable. Thus Long Beach Federal's *surplus* was released for distribution in the form of Equitable stock among Long Beach Federal's 60,000 savings depositors. As a result of the merger, each Long Beach Federal savings depositor became a savings depositor in Equitable. His new account in Equitable equalled his old account in Long Beach Federal. There also became available for distribution to Long Beach Federal savings depositors a bonus of about 13% ($9,500,000 at 1963 prices) in the form of Equitable guarantee stock. How this bonus is to be distributed is the issue of this petition.

[13]The District Court found in its opinion:

". . . The second unnumbered paragraph of 12 U.S.C. §1464(i), under which the conversion and dissolution is had, contains the *second* Congressional expression in the Statute as to the distribution of stock upon conversion and

(This footnote is continued on the next page)

Long Beach Federal's charter was issued in 1934 by respondent Bank Board. It reads in part:

> "Section 9: '. . . All holders of share accounts shall be entitled to equal distribution of net assets, pro-rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Association.'" (233 F. Supp. 578 at p. 592 Appx. I).

Yet respondents required unequal and preferential distribution forfeiting some, and favoring others, of petitioner's thousands of mutual savings depositors.

Respondents' forfeitures caused some of the favored depositors to take *all* their own pro rata share and *also* the *entire* forfeited shares of the excluded depositors, who got nothing (233 F. Supp. 578 at p. 593 and p. 597 Appx. I).

Thereby said forfeitures also caused some favored depositors to receive 13 times more distribution than others, where both had the same amounts deposited.[14]

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dissolution. It reads: '(6) *that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits.*' This provision is in addition to the specific requirement of subsection (b) *that the shares are to be retired as provided in the charter.* And the charter written, signed and issued by the Government requires a prorata distribution on dissolution." (233 F. Supp. 578 at p. 592 Appx. I).

Such expression of the Congressional policy underlying a statute is discussed in *NLRB v. Brown*, 380 U.S. 278 at 291-292, 13 L. ed. 2d 839 at 849 (1965) (See page 35 hereof for quotations).

[14]The details of such arbitrary preferences were ignored by the Court of Appeals. It held the District Court was without power to remedy them regardless of their invalidity (CA-9 Opn. p. 17).

Respondent Bank Board at the time of said merger (in 1963), had not adopted any regulation controlling a direct merger of a federal savings association, such as petitioner, into a California state guarantee stock association such as Equitable. Respondent Bank Board's 1963 regulations regulated only mergers of federal associations with each other or *liquidation* of federal savings and loan associations. Nevertheless, respondents Bank Board, *et al.*, insisted that no merger of Long Beach Federal with Equitable could take place except on retroactive forfeitures dictated by said Bank Board as conditions of such approval months after the savings deposits were made.

Long Beach Federal's $72,000,000 of savings deposits and Equitable's $51,000,000 of savings deposits were insured by respondent Federal Savings and Loan Insurance Corporation. Both respondent Bank Board and Insurance Corporation threatened petitioners with disapproval of the merger and termination of said deposit insurance unless the merger was upon the terms dictated by said respondents. The terms so dictated included an unequal and preferential distribution of Long Beach Federal's $9,500,000 of net worth among its 60,000 mutual savings depositors. Among the preferences and inequalities demanded by respondents were the exclusion of several thousand Long Beach Federal savings depositors from any participation, and severely limiting and restricting the participation of thousands of others.

Such retroactive forfeitures were imposed by requiring that all new savings accounts of more than $10,000 each be excluded from any share of Long Beach Federal's surplus and that all savings accounts, new and old, shown on Long Beach Federal's books as pledged

also be excluded regardless of the size of the account or the age of the deposit, or the purpose of the pledge.[15]

Respondents Bank Board, *et al.*, thereby forfeited the statutory and charter rights of the excluded mutual savings depositors and transferred said forfeited rights to other favored savings depositors (233 F. Supp. 578 at p. 593 and p. 597 Appx. I).

Bank Board Says Savings Accounts of Over $10,000 Each Are Not Bona Fide Yet 150,000 Such Accounts Exist in Three Other Savings Associations.

Respondents claimed their forfeitures were required to protect "small" savings depositors from "large deposits" made by new depositors and from "large" increases in new savings deposits made by older savings depositors.

Respondent Bank Board told both the District Court and the Court of Appeals:

> ". . . the Board believed that generally *new accounts would not be opened by bona fide savers in amounts larger than $10,000* in any one account." (emphasis added).[16]

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[15]The exclusion of the over $10,000 accounts was as to the excess over $10,000 per account. The exclusion of the pledged accounts was to the extent of the pledge. The exact text of respondent Bank Board's forfeitures appears in the District Court opinion (233 F. Supp. 578 at pp. 585-586 Appx. I).

The retroactive forfeitures were imposed at first only on savings accounts of over $100,000 each. (See footnote 9, p. 9 hereof).

[16]Appellant Bank Board's, et al., Opening Brief, page 17. Appellants also made this assertion under oath to the District Court [McMurray affidavit, 3R-1002]. The Court of Appeals in footnote 13, page 7 of its Opinion, quoted said Bank Board's "belief".

But *all* savings and loan associations throughout the United States average over 31.4% of their savings deposits in accounts of more than $10,000 each.[17]

There were more than 150,511 savings accounts of over $10,000 each in *only three* Los Angeles Associations. The total deposits in said 150,511 savings accounts exceeded one and one-half billion dollars. ($1,500,000,000).[18]

$42,000,000 of New Savings Deposits Were Needed to Help Restore Damaged Savings Association Ruined by Bank Board Seizures and $69,000,000 Run.

Petitioners claimed the new deposits were urgently required to partially restore the depleted assets and baldy damaged goodwill and public esteem of petitioner Long Beach Federal.

Respondents Bank Board, *et al.*, in April 1960 had seized petitioner Long Beach Federal without any notice and appointed their Supervisory Representative in Charge.[19] Respondents sought and obtained front page, scare headline publicity of their said *ex parte*

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[17]"1965 Savings and Loan Fact Book", page 19.

[18]Such data was before the Court of Appeals. It was taken from published newspaper ads and financial statements of said three Associations in the Los Angeles newspapers. Copies of such newspaper ads were part of the "Supplement to Reply Brief of Appellees Long Beach Federal, et al., Paragraph XI Re: Three Los Angeles Savings and Loan Associations have over 150,000 savings Accounts of over $10,000 Each".

[19]A Congressional Investigating Committee has found such Bank Board seizure was arbitrary and unlawful and was made to block a conversion of Long Beach Federal from a federal to a state association. Such conversion was the first step to enable distribution of Long Beach Federal's net worth among its 60,000 savings depositors. (See footnote 7, page 8 hereof for record reference to Congressional Committee Report).

seizure. A run of withdrawals of petitioners' savings depositors began at once. At the start of the run petitioner Long Beach Federal had about $96,000,000 of savings deposits held by over 90,000 mutual savings depositors. Withdrawals in the run were as high as $4,000,000 in a single day. Over $69,000,000 (more than 70%) was so withdrawn (233 F. Supp. 578 at p. 583-585 Appx. I).

In 1962 as a result of Congressional Investigations and Federal Court actions, said respondents returned the remnants of seized Long Beach Federal *to the very same management from which they had seized it* (233 F. Supp. 578 at pp. 583-584 Appx. I).

Respondents paid over $5,000,000 in damages for dismissal of said actions. They also agreed in a "Settlement Agreement"[20] that Long Beach Federal could merge with Equitable and thereby distribute Long Beach Federal's net worth "equally and pro rata" among all Long Beach Federal savings depositors.

When Long Beach Federal was so returned it had less than $30,000,000 left of the original $96,000,000 of savings deposits.

Long Beach Federal was in desperate need of immediate new savings deposits to replace the $69,000,000, 70% of its deposits, lost in the 1960 run.[21]

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[20]The 100-page "Settlement Agreement" is Plaintiff's Exhibit "8". It is discussed at 233 F. Supp. 578 at p. 584, 586, Appx. I.

[21]A prior seizure of Long Beach Federal in 1946-48 by the predecessors of respondent Bank Board had caused a $10,000,000 run of withdrawals (about one-half of the then savings deposits.) This seizure also ended with the return of Long Beach Federal to exactly the same management from which it had been seized by said respondent. A third seizure for the expressed purpose of involuntary liquidation was threatened. It was prevented only by a Federal Court injunction.

Long Beach Federal, Equitable and their respective officers, directors, *et al.*, made every effort to attract *all* new savings deposits to Long Beach Federal by both new and old depositors. Long Beach Federal spent tens of thousands of dollars in repeated full page newspaper ads and for television, radio, etc. About $24,000,000 of such new deposits came on the first and second day after Long Beach Federal was restored from the seizure [Pltf. Exs. 12B-3 thru 12B-17]. The total of such new deposits amounted to $42,000,000 by November 30, 1962. This was only about one-half of the $69,000,000 of savings deposits lost in the run of withdrawals resulting from the 1960-1962 seizure by respondent Bank Board.[22]

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[22]The Court of Appeals said in footnotes 10 and 12 on page 6 of its opinion:

"[10]In its proposed finding of fact No. 28, Long Beach stated:

'28. In March-April, 1962, Long Beach Federal's officers and its Shareholders' Protective Committee wished to rehabilitate the precarious financial condition of the seized Association. They felt substantial new savings deposits were urgently and immediately required for such rehabilitation. The first few days of the restored Association upon its return to its founding management were believed to be the most critical time.'

"...

"[12]As stated in its opening brief on these appeals, Long Beach believes that the deposit of these additional sums were beneficial in the following respects:

"'(a) Equitable paid $3,000,000 in guarantee stock for the goodwill of the restored Association. Said goodwill resulted solely from the new $42,000,000 of savings deposits.

"'(b) The additional $3,000,000 to be impounded for 10 years was released for immediate distribution among the Long Beach Federal depositors. Equitable's assumption of all Long Beach Federal liabilities, known as well as unknown, made this release possible.

(This footnote is continued on the next page)

Bank Board Retroactively Forfeits Savings Deposits. Months After Deposits Were Made.

No savings depositor was ever given any notice *prior* to making his deposits that his new (or old) deposits would be denied their statutory and charter rights to equal and pro rata participation in their mutual association's net worth, surplus and reserves (233 F. Supp. 578 at p. 597 Appx. I).

A Bank Board Member, Bank Board counsel and dozens of Bank Board personnel were personally present in Long Beach Federal in April, 1962, when the premises of the Association were thronged with returning, and new, savings depositors who made over $24,000,000 of new savings deposits in two days. Yet no notice or warning of any kind was given, or ordered by respondent Bank Board of its forfeitures to any of the thousands of new depositors swarming into Long Beach

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"'(c) Approximately $3,884,000 of possible income taxes were saved. The $42,000,000 in new savings deposits under 26 U.S.C. 593 created a tax shelter of 12% or about $5,000,000. This tax shelter enabled Long Beach Federal to received [sic] the $5,000,000 compensation paid it by appellants Bank Board and Insurance Corporation as damages, tax free. The $5,000,000 tax shelter also enabled Long Beach Federal to transfer its surplus to Equitable without taxes which might otherwise have wiped out the distribution.' (Record references and footnotes omitted.)

"In its reply brief the Board took issue with all of these assertions."

But the Court of Appeals never considered or decided whether the $42,000,000 of new savings deposits were required for the survival of Long Beach Federal just emerging from the two years of Bank Board seizure and a $69,000,000 (70%) run of withdrawals. The Court of Appeals assumed the Bank Board's forfeitures were invalid but yet held the District Court was without power to remedy them (CA-9 Opn. p. 17).

Federal to deposit their savings in their restored association.

Only months after the new deposits were made did respondent Bank Board attempt to retroactively forfeit *any* of the new deposits. Even then the proposed retroactive forfeitures were to affect *only* new accounts of *over $100,000* each. There were 54 such accounts.

But when Long Beach Federal refused to betray those of its new depositors whose accounts exceeded $100,000 each, then respondent Bank Board expanded its retroactive forfeitures to include *all* new accounts over *$10,000* each, and to all accounts, old and new, which were assigned or pledged to secure a debt (233 F. Supp. 578 at p. 585 Appx. I).[23] There were thousands of such accounts.

It was almost a year after the $24,000,000 of new savings deposits were made before respondent Bank Board finally announced which of thousands of the new savings accounts would be retroactively forfeited and the extent of such forfeitures.

Respondent Bank Board held no administrative hearing. It made no findings, or even accusations, of any guilt or wrong.

Respondent Bank Board's only findings were that its forfeitures were "advisable and in the interest of all concerned" and were "fair and equitable". Such findings were made without any notice, testimony or hearings [F.H.L.B.B. Order No. 17177; Pltf. Ex. 3-D-4].

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[23]See footnote 9, page 9 hereof.

All Long Beach Savings Depositors Vote for Equal and Pro Rata Distribution and Condemn the Bank Board's Forfeitures as Arbitrary and Illegal.

A mass meeting of Long Beach Federal depositors was held in the Long Beach Municipal Auditorium. Resolutions unanimously adopted by the depositors at that meeting said in part:

> "We condemn as arbitrary, unjust and illegal the attempts of the seizing Bank Board and Insurance Corporation, or their successors, to compel an unconstitutional and illegal forfeiture of our said savings account investors' rights to their proportionate share of our Association's net surplus, reserves, and undivided profits."

Said resolutions also thanked the new large savings depositors for:

> "Investing in new savings accounts or increasing the amounts of existing accounts in amounts in excess of the $10,000.00 insurance of accounts; and
>
> "Also [for] borrowing . . . to obtain money to invest in our mutual savings Association in its time of peril and need immediately following said restoration." [Pltf. Ex. 7-A-2-7].

Long Beach Savings Depositors Vote for Merger in Reliance Upon Bank Board's Provisions for a Court Test of Any Part Thereof.

Resolutions were also unanimously adopted asking Congress to aid the merger. As a result respondent Bank Board's Chairman was questioned in 1963 before Congressional Committees. He then denied any power

to make any distinctions between large and small or old and new federal savings depositors.[24]

He was directed by the Congressional Committee to file a written report on the progress of the Long Beach Federal-Equitable merger. Before making such report to Congress, respondent Bank Board through its Chairman, members, and counsel, originated a new paragraph to be added to the Merger Agreement. It read in part:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (emphasis added).

The language *"any* part thereof" was a severance clause. Any part could be accepted. Any other part be contested. See page 43 hereof.

The Court of Appeals quoted said language and held it was ". . . the provision permitting a court test of the distribution provisions" (CA-9 Opn. p. 19). But yet held the only remedy was to enjoin *the entire* merger.

Copies of the Merger Agreement containing such ". . . provision permitting a court test of the distribution provisions" were mailed to all Long Beach Federal depositors. The mass meeting in the Municipal

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[24]The District Court commented (in a footnote in 233 F. Supp. 578 at p. 599 Appx. I) upon said Bank Board Chairman's "trapezical agility to shift, depending on whether or not he was talking to a Congressional Committee, to the public, or to Long Beach Federal. . . ." See footnote 34, pp. 29-31, hereof for details.

Auditorium was resumed in July, 1963. 96% of all the votes cast were in favor of said merger.[25]

Copies of said vote in favor of the merger, including copies of said ballots, were sent to respondents.

Respondent California Commissioner thereafter approved the merger conditionally. One of the conditions was:

> "On or before December 31, 1963, EQUITABLE shall make distribution of the guarantee stock of EQUITABLE to the shareholders of LONG BEACH FEDERAL . . . *subject to the lawful orders of any court of competent jurisdiction* which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Pltf. Ex. 3-B-1]. (emphasis added).

Such conditional approval was transmitted to respondents Bank Board and Insurance Corporation. They approved such condition and on September 4, 1963

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[25]The ballots of said 96% read in part:

"This ballot is cast in favor of said merger in reliance upon:

"1. That portion of the merger agreement, proxy statement, etc., which reads as follows:
'This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, *or any part thereof*, incorporated herein.', and

"2. The action of the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, et al., in approving said merger agreement, proxy statement, etc., containing said above quoted language." (emphasis added). [Pltf. Ex. 12-9-63-4].

gave their *final* approval. On September 5, 1963 respondent California Commissioner gave his *final* approval. But a single business day elapsed (*i.e.* Friday September 6, 1963) between the *final* approval by respondents, September 5, 1963, and the filing of petitioners' Court actions in reliance upon and under the terms of the ". . . provision permitting a court test of the distribution provisions."[26]

Yet the Court of Appeals holds petitioners were guilty of "laches" in not suing to wreck and enjoin their entire merger *before* it took place.

Jurisdiction of the District Court.

Petitioners and plaintiffs below in their complaints,[27] cross-claims, etc., based the jurisdiction of the U.S. District Court on the Fifth Amendment to the Constitution of the United States, on the Administrative Procedure Act, 5 U.S.C. §§1001-1011, and upon the other statutes cited by the District Court in its judgments.[28]

Plaintiffs also relied on 28 U.S.C. §1391(e) [1R-3].

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[26]September 7, 1963, was a Saturday; September 8, 1963, was a Sunday; September 9, 1963, was a California Holiday (Admission Day).

[27][1R-1-28; 2R-7-29; 3R-2-17;]

[28]Paragraph I, of said judgments reads:

"That jurisdiction of this court, of the parties and the subject matter exists under the Interpleader and Declaratory Relief Statutes, the Home Owners Loan Act, and the Administrative Procedure Act, all as amended and in force now or on the date of the occurrences involved in this litigation. [28 U.S.C. §§1335, 1397, 2201, 2202, 2361; F.R.C.P. 13, 22, 56(a), 12 U.S.C. 1464(d)(1), 1725(c)(4); and 5 U.S.C. 5]."

REASONS WHY THE WRIT SHOULD BE GRANTED.

The Court of Appeals has erroneously, we believe, decided important federal questions by destroying any effective judicial review of respondent administrative agencies. (including respondents Bank Board *et al.*)[29] Nowhere in the 21 page opinion does the Court of Appeals cite or discuss the Administrative Procedure Act. Such decision is contrary to said Acts of Congress and to the long line of decisions of. This Court thereon. It is also contrary to prior decisions of the same Court of Appeals in prior litigation between petitioners and respondents Bank Board, *et al.* (See p. 31 hereof)

The application of such 1967 Court of Appeals decision is not limited to petitioners. If left uncorrected it will encourage multitudes of similar *ex parte* and retroactive administrative forfeitures.

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[29]The Court of Appeals' opinion at page 17 says:

> "We do not question the power of a district court, in appropriate circumstances, to determine the legality of provisions of a particular merger-distribution plan. We hold, however, that under the circumstances of this case the district court was without power to remedy . . . invalid distribution provisions. . . ."

But the "appropriate circumstances" required by the Court of Appeals can never occur. The opinion holds at page 21:

> ". . . that laches is a bar to these suits, whether the relief sought would or would not require a setting aside of the merger. . . ."

Petitioners' suits were filed the same day as the merger and only *one* business day after *final* approval of the merger by respondents. Enjoining and wrecking a merger before it is made is the *only* remedy the Court of Appeals would permit. This remedy is illustory and non-existent. See pages 36 to 42 hereof for discussion.

Over twenty million (20,000,000) people are mutual savings depositors in 2051 federal savings and loan associations. They own their seventy billion dollars ($70,000,000,000) of mutual savings deposits and assets.[30] They have the federal statutory right to "equal and pro rata" distribution of the net assets of their mutual federal savings associations upon merger or dissolution. Such rights are given them by the Acts of Congress authorizing the creation of such federal associations and also by the federal association's charters.

Under the Court of Appeals' opinion the Bank Board can require unequal and preferential distribution. Thousands of savings depositors can be forfeited and receive no distribution. Others can take their own statutory share and also take the forfeited shares of their fellow savings depositors.

Even before this decision respondents Bank Board *et al.*, in 1966 merged or otherwise dealt with 20 or more savings and loan associations.[31] If the Court of Appeals' opinion remains uncorrected the rights and ownership of *every* federal savings and loan depositor in the 2051 federal associations exist only at the pleasure or whim of respondent Bank Board.

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[30]Figures are estimates taken from Federal Home Loan Bank Board 1966 Source Book and 34th Annual Report and 1965 Savings and Loan Fact Book of United States Savings and Loan League.

[31]34th Annual Report of Federal Home Loan Bank Board to Congress 1966 page 80 and pages 64-65.

I.

The Constitutional and Statutory Power of United States Courts to Correct Unconstitutional, Illegal, or Void Administrative Action Is Destroyed Without Discussion.

The Court of Appeals says in part:

> ". . . the district court was without power to remedy what it regarded as invalid distribution provisions of an administratively approved merger-dissolution plan, by designating a revised distribution plan, without the administrative approval required by state and federal statutes and regulation, . . ." (CA-9 Opn. p. 17).

The Acts of Congress and the Long Beach Federal charter required equal and pro rata distribution. The District Court judgment also ordered equal and pro rata distribution. It merely followed the exact terms of the charter and statute.

The Court of Appeals acknowledged that what it called the "revised distribution plan" enforced by the District Court, was only the *equal* and *pro rata distribution* expressly required by the Acts of Congress, Long Beach Federal's charter, and the Settlement Agreement between petitioners and respondents.

Such acknowledgment was made by the Opinion saying at page 17: ". . . the court-required *pro rata* distribution plan." (emphasis added).

Enforcement by the District Court of the express terms of the Acts of Congress was not "designating a revised distribution plan."

The Court of Appeals also assumed that respondents retroactive forfeitures were invalid. It said at page 17 of its opinion:

"The problem then arises as to what remedy was available *assuming that the district court was correct* in determining that the restrictive distribution provisions of the approved merger agreement were invalid. . . ." (emphasis added).

Respondents contend, and the Court of Appeals held, that *no* remedy was available because, as the Court of Appeals said at page 20 of its Opinion:

". . . the district court is without power to formulate and enforce a new distribution plan free and clear of Board and Commissioner approval. . . ."

Thereby the Court of Appeals constituted respondent administrative agencies as the supreme court of last resort.

Respondents forfeitures were condemned by both the District Court and Congress. The District Court held respondents forfeitures were "illegal and void . . . arbitrary and contrary to, and without authority, in law." (233 F. Supp. 578 at p. 598 Appx. I).

A Congressional Investigating Committee said:

". . . The Board's . . . actions must be characterized as arbitrary and unlawful and of the most reprehensible sort. . . . by preventing the conversion the board deprived the Association of a right created by . . . Congress . . . Without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power. . . ."[32]

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[32]The Congressional Committee had heard the sworn testimony of respondent Bank Board's then Chairman, members, counsel, and staff. Said Committee's full report is Appx. III to petitioners briefs in the Court of Appeals.

By holding "the district court is without power" to remedy such unlawful action, the Court of Appeals places respondents beyond judicial review. Yet nowhere does the Court of Appeals cite or discuss any of the several statutes subjecting Bank Board to judicial review.

Congress at least twice enacted statutes subjecting respondents to judicial review by the U.S. Courts. The Federal Administrative Procedure Act, reads in part (5 U.S.C. §§1009(c), (e):[33]

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> ". . .
>
> "(c) *Acts reviewable.* Every agency action made reviewable by statute and *every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.*
>
> . . .
>
> ". . .
>
> "(e) *Scope of review.* So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and deter-

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[33]In September, 1966, Congress by Pub. L. 89-554, 80 Stat. 392, revised and re-enacted Title 5 of the U.S. Code. Old §1009 was divided into new sections 701 and 702 through 706. The "Explanation" (page v of 1967 Edition of Title 5) says in part:

> ". . . the enactment . . . did not involve substantive changes in the law, . . ."

The language above quoted became 5 U.S.C.A. 701(a), 704 and 706.

The Opinion of the District Court refers to 5 U.S.C. §1009 as it was numbered up to September, 1967. Hence, we quote it under its old number.

mine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (4) without observance of procedure required by law; . . ." (Emphasis added.)

As a result of lengthy Congressional Investigations of respondents Bank Board *et al.*, in 1946 and again in 1951-1952, Congress in 1954 amended and revised 12 U.S.C. §1464, the section under which the federal savings system is authorized and created. After such 1954 amendment, 12 U.S.C. §1464(d) reads in part:

". . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located."[34]

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[34]The legislative history of this amendment demonstrates that it was enacted for the express purpose of subjecting respondent Bank Board to suits then (1954) pending by petitioner Long Beach Federal. Respondent Bank Boards 1954 Chairman Walter W. McAllister testified before both the House and the Senate Banking and Currency Committees. Part of his testimony is set-forth in Petitioners Appendix III to their brief in the Court of Appeals, pages 24-25 of the "Twenty-Third Report by the Com-

(This footnote is continued on the next page)

As part of such 1954 amendment Congress also enacted:

> "Inconsistent Laws. Section 818 of Act Aug. 2, 1954, [60 Stat. 648.] provided: 'Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling.'"

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mittee on Government Operations" on "Federal Home Loan Bank Board Seizure of Long Beach Federal Savings and Loan Association". He is there quoted:

> "Chairman McAllister went on to say that in addition to formalizing the administrative machinery, the other purpose of the bill was:[8]
>
> "'. . . to protect the institution and management from the capricious and arbitrary acts of the Board. If the Board were to simply make up its mind it wanted to take a certain action with regard to an institution, they could cause that institution and management considerable embarrassment, if not loss and cessation of business.'
>
> "Then Senator Bennett asked Chairman McAllister to point out the type of issue or disagreement between the Board and the industry which occasioned the new legislation. Chairman McAllister replied:[9]
>
> "'We have a well-known case, that of the Long Beach Federal, Long Beach, Calif.; that has been in the courts for about 7 years, and they have had various kinds of congressional hearings.
>
> "'It is my honest belief that if that statute had been in force at that time, that the difficulty could have been avoided.'"

"[6]Housing Act of 1954, hearings before the Committee on Banking and Currency, U.S. Senate, 83d Cong., 2d sess., on S. 2889, S. 2938 and S. 2949, pt. 1, p. 82.
[7]Ibid. p. 83.
[8]Ibid.
[9]Ibid., p. 84."

In 1963 respondent Bank Board's Chairman McMurray testified twice before Congressional Committees. He was before the House Committee on Appropriations on January 24, 1963 and before the House Committee on Banking and Currency on May 7, 1963. He swore to said committees ". . . that all depositors . . . were treated alike, whether [their deposits were] $100.00 or $100,000.00 and whether pledged or not; . . . or whether their deposits have been in . . . one year, ten years or 20 years.

California statutes also make respondent California Savings and Loan Commissioner's orders re mergers subject to judicial review.[35]

The District Court in its opinion cited and relied upon the above and other statutes subjecting respondents to judicial review.

The Court of Appeals discussed none of them.

Yet in prior litigation between these same petitioners and respondents, the same Court of Appeals has twice, in 1952 and in 1961 cited and discussed the Adminis-

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. . ." (See footnote 4 of 233 F. Supp. at p. 599 Appx. I). But after he so testified, he yet imposed on Long Beach Federal the retroactive forfeitures held invalid by the District Court.

For the decisive effect of such legislative history on the meaning of a statute. See *Tcherepnin v. Knight,* October, 1967, Term No. 104 (12-18-67) ..... U.S. ..... at ....., 19 L. ed. 2d 564 at 571-572. This Court there held savings and loan associations bound by the conduct and testimony of their representatives before committees of Congress and by their public statements as to the effect of such laws.

Commissioner v. Bilder, 369 U.S. 499 at 502-505, 8 L. ed. 2d 65 at 68-69 (1962), and *Abbott Laboratories v. Gardner,* 387 U.S. 136 at 140-141, 18 L. ed. 2d 681 at 686-691 (1967) make similar holdings.

[35]California Financial Code §5258 provides as to respondent California Savings and Loan Commissioner:

> "§5258. *Acts of commissioner subject to judicial review:* . . . Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2 and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. . . ."

Said chapters include those regulating mergers of federal and California savings and loan associations. Respondent California Commissioner said his order approving the merger was ". . . subject to the lawful orders of *any* court of competent jurisdiction which may otherwise control the distribution . . ." of the stock now in Court. (emphasis added) [Pltf. Ex. 3-B-1].

trative Procedure Act and held respondents subject to judicial review.[36]

Congress has also been explicit in requiring mutuality and equal and pro rata distribution in all federal savings associations. 12 U.S.C. §1464(a) authorizes the creation of federal savings associations such as petitioners. It expressly requires that they be mutual and that the charter issued to them be mutual. It reads:

> "In order to provide local *mutual* thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and *to issue charters therefor,* giving primary consideration to the best practices of local *mutual* thrift and home-financing institutions in the United States." (emphasis added).

12 U.S.C. §1464(b) requires that all deposits shall be as authorized by the charter and shall be repaid in accordance with the charter terms. It reads in part:

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[36]In 233 F. Supp. 578 at p. 588 Appx. I the District Court said:

> "[7,8] The Administrative Procedure Act is applicable to the Bank Board, and its actions are judicially reviewable, and it does not have 'uncontrolled discretion.' [Home Loan Bank Board et al. v. Mallonee (9 Cir. 1952) 196 F. 2d 336, Cert. den. Mallonee v. Fahey, 345 U.S. 952, 73 S. Ct. 863, 97 L.Ed. 1374; Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association (9 Cir. 1961) 295 F.2d 403] . . . Section 10 of the Administrative Procedure Act [5 U.S.C. § 1009], particularly subdivision (c) thereof . . . provides that: 'every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.'"

> *"Capital: deposits; Certificates of indebtedness*
> "(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, *which shares may be retired as is therein provided."* (emphasis added).

The charter issued to Long Beach Federal by respondent Bank Board reads in part in section 9:

> "'. . . All holders of share accounts shall be entitled to *equal distribution* of net assets, *pro-rata* to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Association'" (emphasis added). (233 F. Supp. 578 at p. 592 Appx. I).

Congress has also enacted its requirements for equal distribution when a Federal savings association converts to a state association. 12 U.S.C. §1464(i) reads:

> ". . . '(6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association *in exact proportion to their relative share or account credit.*' . . ." (emphasis added)

The District Court by its judgment requiring equal and pro rata distribution only enforced the express requirements of the Acts of Congress. Congress created the Federal savings system. It included in that system requirements for *equal* pro rata distribution when a federal association converted to a state association or liquidated or dissolved.

Respondent Bank Board has repealed these Acts of Congress by requiring preferential and *unequal* distribution, forfeiting thousands of petitioners mutual savings depositors and favoring others.

By such forfeitures one group of favored savings depositors can receive a distribution of many times their statutory pro rata shares. The forfeited savings depositors receive no distribution. Yet both the favored and the forfeited savings depositors had the same amounts on deposit in their respective savings accounts.

Congress also specifically subjected respondents:

> ". . . to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulations, in the United States district court for the district where the home office of such association is located, . . .". (12 U.S.C. §1464-(d)).

Congress also said "The provisions of this Act shall be controlling".[37]

Yet the Court of Appeals has held the District Court powerless to review such illegal forfeitures. Thereby respondents' arbitrary and void administrative forfeitures, instead of the Constitution and laws of the United States, are made the supreme law of the land.

In *Land v. Dollar,* 330 U.S. 731, 91 L. ed. 1209 (1947), the United States Maritime Commission attempted to forfeit plaintiffs corporate stock. This Court said at U.S. page 738, L. ed. page 1216:

> ". . . But public officials may become tort-feasors *by exceeding the limits of their authority.* And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dom-

[37]See Pages 29-31 hereof for full text and legislative history.

inant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." (emphasis added).

In *NLRB v. Brown*, 380 U.S. 278, 13 L. ed. 2d 839 (1965), this Court said at U.S. pages 291-292, L. ed. 2d page 849:

> ". . . Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. . . .
>
> "[21, 22] Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.'"

In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 18 L. ed. 2d 681 (1967), this Court said at U.S. pages 140-141, L. ed. 2d pages 686-687:

> ". . . a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. (citing authorities) . . . only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. . . ."[38]

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[38]See footnote 34, pages 29-31 hereof for legislative history of 1954 amendment of 12 U.S.C. §1464(d) enacted to make respondent Bank Board subject to suit and judicial review by petitioners Long Beach Federal, *et al.*

In *Sterling v. Constantin*, 287 U.S. 378, 77 L. ed. 375 (1932), this Court said at U.S. page 404, L. ed. page 388:

> ". . . Complainants had a constitutional right to resort to the Federal court to have the validity of the Commission's orders judicially determined. . . ."

II.

Compelling Federal Savings Depositors to Sue Only Before Any Merger Places a Premium on "Strike Suits".

The Court of Appeals' opinion *requires* and places a premium upon strike suits by minority stockholders-depositors of *all* federal savings and loan associations. Many beneficial mergers have been wrecked by premature and unfounded minority stockholder litigation.

Such strike suits, which the Court of Appeals now holds are the *only* remedy of over twenty million federal savings depositors, are long discredited. They place a premium upon obstructive action and are often used to coerce excessive compromise payments not justified by the merits of the claims.[39]

They have been the subject of much remedial legislation by many of the states.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. ed. 1528 (1949) the U.S. Supreme Court said at U.S. page 438, L. ed. page 1537:

> "Unfortunately, the remedy itself [stockholders suits] provided opportunity for abuse which was not neglected. Suits sometimes were brought not to redress real wrongs, but to realize upon their

[39]The article on "Extortionate Corporate Litigation: The Strike Suit" appearing in the Columbia Law Review, Notes, Vol. 34, pages 1308-1331, contains discussion, and a multitude of citations *re* strike suits.

nuisance value. They were bought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payments from corporate assets. These litigations were aptly characterized in professional slang as 'strike suits.' . . ."

The Court of Appeals' opinion holds that enjoining the $159,000,000 merger *before it occurs* was the only remedy available to the thousands of small Long Beach Federal savings depositors. But an injunction to block a $159,000,000 merger requires a bond. (F.R.C.P. §65(c); California Code of Civil Procedure §529). No small savings depositor or any group of them can be expected to meet the requirements of such a bond.

At the time of the merger, Long Beach Federal's assets exceeded $90,000,000. Equitable's assets exceeded $68,000,000. Their combined pro-forma statement shows almost $159,000,000 total assets. Any injunction bond required to indemnify the 60,000 Long Beach Federal savings depositors and 24,000 Equitable depositors and stockholders would threaten to ruin and bankrupt any small Long Beach Federal savings depositors attempting to enjoin such a merger.[40]

The duration of the injunction as this very case demonstrates, would be at least 4 years.[41] The amounts lost

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[40]The injunction against merger obtained in 1946 but reversed as "premature" by This Court in *Fahey v. Mallonee*, 332 U.S. 245, 257, 91 L. ed. 2030 at 2041 (1947) was against only a U.S. conservator who then (in 1946-1948) was in possession of Long Beach Federal under respondents first seizure. Only a nominal injunction bond was required under these circumstances. (See footnote 43, page 39 hereof)

[41]The merger was made September 10, 1963. The District Court actions were filed the same day. The District Court's opinion was rendered in 1964 and its judgment was made in 1965. The Court of Appeals' opinion was filed in August, 1967, Rehearing was denied in January, 1968.

if an injunction prevented the merger and then proved to be wrongful could exceed $10,000,000. ($9,500,000 of Equitable's stock, at 1963 prices, plus litigation expenses, etc., defending against the injunction).

Thus the only remedy suggested by the Court of Appeals is illusory and non-existent. Yet petitioners so abstaining from ruining *all* their fellow savings depositors and their savings association is held to forfeit every other right ever to be heard on the merits.[42]

III.

The Equitable Rule of Laches Is Misused to Cause Injustice, Instead of to Prevent It.

The 1963 merger of Long Beach Federal-Equitable remained entirely "hypothetical" until *final* approval on September 4th and 5th, 1963 by *both* respondents Bank Board and California Savings and Loan Commissioner. The California Commissioner did not *finally* approve the merger until September 5, 1963. His first approval was on August 28, 1963. *It was conditional.* One of such conditions was that:

> ". . . . EQUITABLE shall make distribution . . . to the shareholders of LONG BEACH FEDERAL . . ., subject to the lawful orders of any court of competent jurisdiction . . ." [Pltf. Ex. 3-B-1].

This condition was approved by respondents Bank Board *et al.* (233 F. Supp. 578 at pp. 596-597, Appx. I).

The merger took place early Tuesday September 10, 1963. Three of the intervening days between Thursday September 5, 1963 and Tuesday September 10, 1963

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[42]See footnote 45, pages 40-41 hereof.

were holidays (Saturday, Sunday, and Monday, California Admission Day). Thus, but a *single* business day intervened between the time the merger ceased to be "hypothetical" and the class actions were filed to test the validity of the stock distribution.

The Court of Appeals' opinion which says at page 19, petitioners:

> ". . . had from at least the middle of June, 1963, until September 10, 1963, when the merger was consummated, within which to institute litigation seeking to enjoin the merger . . ."

is contrary to the record, and *Fahey v. Mallonee,* 332 U.S. 245, 91 L. ed. 2030 (1947).[43]

Petitioners had but one business day, Friday September 6, 1963 in which to have tried to enjoin the merger.

No trial of the factual issues of laches was held. The Court of Appeals, despite the conflict in the record and affidavits, decided this issue as a matter of law.

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[43]More than twenty years ago Long Beach Federal savings depositors, through their same depositors' protective committee, in this same litigation against the predecessor of this same Bank Board, enjoined a then threatened merger of their association *before* it could take place. This Court held such injunction was premature, and said in *Fahey v. Mallonee,* 332 U.S. 245, 91 L. ed. 2030 (1947) at U.S. page 257, L. ed. page 2041:

> ". . . The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined . . . *we do not consider it necessary to discuss the legality of hypothetical mergers.*" (emphasis added).

It was in the light of this U.S. Supreme Court decision in the prior years of this same litigation, that *all* parties including petitioners and respondents, agreed that the court test of the merits or validity of the merger "or any part thereof" would take place *after* instead of *before* completion of the merger. Another "premature" attempt to secure judicial decision of the validity of the "hypothetical" merger was not contemplated after the 17 years of prior litigation (1946-1962).

This Court has repeatedly refused to permit mere lapse of time to block justice for oppressed minority stockholders.[44]

Rights of minority stockholders have been protected *after* merger.

In *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L. ed. 2d 423 (1964) minority stockholders sued to enjoin the merger of their corporation. The injunction was denied and the merger took place. Five years *after* the merger they were allowed to amend their complaints. (317 F. 2d 838 at 840). This Court affirmed and said at U.S. pages 433-434, L. ed. pages 428-429:

> ". . . It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, *federal courts may use any available remedy* to make good the wrong done.' (citing authorities)" (Emphasis added).[45]

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[44]In *Southern Pacific Co. v. Bogert*, 250 U.S. 483, at 488-490, 63 L. ed. 1099, at 1106-1107 (1919) this Court, 30 years after a merger, required compensation for minority stockholders wrongfully excluded therefrom. The action in which such distribution was ordered had not been filed until 22 years *after* the merger.

In *Northern P. R. Co. v. Boyd*, 228 U.S. 482, at 509, 57 L. ed. 931, at 944 (1913), a complicated railroad merger and reorganization took place. One creditor litigated for 26 years from 1887 to 1913. 10 years *after* the merger he brought his first action against the reorganized railroad which defended on the ground of laches. This Court held the 10 years of delay did not bar the enforcement of his claim.

[45]12 U.S.C. §1464(d) provides for such a "general right to sue." It says respondent ". . . Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any

See also:

1. *Schwabacher v. U.S.*, 334 U.S. 182 at 200, 92 L. ed. 1305 at 1317 (1948).

2. *Lebold v. Inland Steel Co.*, 125 F. 2d 369 at 375 (CA-7, 1941), [Cert. denied 316 U.S. 675, 86 L. ed. 1749 (1942)].

3. *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765 at 777 (CA-8, 1906).

4. *American Seating Co. v. Bullard*, 290 Fed. 896 at 901 (CA-6, 1923).

The California Savings and Loan Commissioner precluded pre-merger litigation by the terms of his stock permit and conditional approval of the merger.

Under his conditions Equitable stock could not be distributed until after it was issued. It could not be issued until *after* the merger.[46] When so issued it was to be distributed only ". . . subject to the lawful orders of

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other law or regulation, in the United States district court for the district where the home office of such association is located, . . .". (The legislative history of said section is discussed on p. 29 hereof.)

The Court of Appeals' comments in footnote 28 at page 17 of its opinion upon other possible remedies which the Court of Appeals says petitioners did not seek from the District Court, such as appraisal rights, or damages for conversion. But appraisal rights were expressly prohibited by the terms of the Merger Agreement dictated by respondent Bank Board, *et al.* (See petition for Certiorari by Intervenor Ross page 26 for discussion). And petitioners sued for declaratory relief and prayed for any equitable relief the court might deem just. Such would include damages for conversion.

[46]On August 30, 1963, the California Commissioner issued his stock permit [Pltf. Ex. 3-C-2] authorizing Equitable to issue its guarantee stock to Long Beach Federal savings depositors *only after* the merger. Said stock permit read in part on pages 1 and 3:

"*Authorization: Upon . . . consummation of the merger* in accordance with the provisions of the Order Approving Merger by the Savings and Loan Commissioner of the State

(This footnote is continued on the next page)

any court of competent jurisdiction . . .". Until the "merger was consummated" and stock was issued any litigation over its distribution would be premature and "hypothetical".

Long Beach Federal in 1946 enjoined a merger *before* it could occur. This Court reversed in 1947 and refused to decide the merits of "hypothetical" mergers. In 1963 Long Beach Federal sued *after* the merger. The Court of Appeals now refuses to consider the merits because of "laches" for not again suing prematurely to enjoin the merger.

All parties knew the Court test of distribution was to follow and not precede the merger.

The Proxy Statement mailed to all 60,000 Long Beach Federal savings depositors informed them that litigation in Court might prevent "any distribution whatsoever".[47] But the Proxy Statement did not say (and no one intended) that litigation might enjoin and prevent any *merger* whatsoever.

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of California dated August 28, 1963, Equitable Savings and Loan Association is authorized to issue 791,650 shares of its One Dollar ($1.00) par value guarantee stock to the withdrawable shareholder members of Long Beach Federal Savings and Loan Association. . . .

". . .

"No certificates of shares of guarantee stock shall be issued or sold or other acts done, pursuant to the authorization above set forth unless and *until . . . consummation of the merger. . . .*" (emphasis added).

[47] Said Proxy Statement read in part on page 5:

"The management of Long Beach is informed that certain shareholder-members may contest in court the validity of the foregoing participation plan insofar as it excludes from distribution rights part or all of their share account balances on November 30, 1962. . . .

"If all Long Beach members in a position to do so were to contest the plan of distribution, therefore, as much as 26% (205,829 shares) of the stock being paid by Equi-

IV.

Respondent Bank Board's Language "or Any Part Thereof" Was a Severance Clause Expressly Permitting a Court Test of "Any Part" of the Merger After the Merger Took Place.

The severance clause of the Merger Agreement is quoted at pages 7, 14 and 19 of the Court of Appeals' opinion:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (Emphasis added).

It is aptly stated by the Court of Appeals on page 19 of its opinion as ". . . the provision permitting a court test of the distribution provisions".

But, said Court's opinion erroneously, we believe, limits such "court test of the distribution provisions" to *only* a court test of the *entire* merger, *prior* to the merger.

This language permitting a court test of "*any part*" of the Merger Agreement originated with respondents Bank Board and Insurance Corporation.[48] Such lan-

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table might become involved in litigation which could prevent its prompt distribution. *Such litigation could* conceivably delay or *prevent any distribution whatsoever.*" (emphasis added) [Pltf. Ex. 7-A-4-3].

[48]The U.S. District Court so found in its opinion. In 233 F. Supp. 578 at p. 596, Appx. I the court found:

". . . The Bank Board proposed the language, and agreed to the insertion of the provision that the validity of *any part* of the Agreement could be contested. . . ." (Emphasis by the court)

No respondent has denied or contested this finding. See page 20 hereof.

guage is to be construed most strongly against those U.S. agencies who draft and originate it.[49]

Yet this language originated by respondents is now construed by the Court of Appeals as requiring that the *entire* merger *must* be enjoined *before* it occurs.

Respondent Bank Board by its own language expressly made the merger severable. "Any part" could be accepted. Any other part could be tested by the "provision permitting a court test" (CA-9 Opn. p. 19). No restriction was made as to when said "court test" of "any part" must be made.

What the parties expressly made separate and severable the Court of Appeals has re-written and made whole and indivisible.

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[49]The same Court of Appeals had so held in *R.F.C. v. Sullivan Mining,* 230 F. 2d 247 at 250-251 (CA-9, 1956). The Court said at pages 250-251:

> ". . . But the government in effect contends that the crucial clause of the 1944 amendment does not mean what it appears to say. . . . The 1944 agreement was written in its entirety by Metals Reserve. [A U.S. Government Agency] not by Sullivan, and its language, where ambiguous, is to be construed strongly against the author. See Restatement, Contracts, §236(d): 'Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, . . .'"

In *Krupp v. Federal Housing Administration,* 285 F. 2d 833 (CA-1, 1961) the First Circuit Court of Appeals said at page 836:

> ". . . these provisions are to be construed against the defendant [F.H.A.] which drafted them, . . ."

V.

The Court of Appeals Approves Retroactive Forfeitures of Thousands of Innocent Small Federal Savings Depositors' Statutory and Charter Rights Without Findings or Trial and Regardless of Their Guilt or Innocence.

Respondent Bank Board held no hearings nor did it take any testimony.

No savings depositor was ever given any notice *prior* to making his deposits that his new (or old) deposits would be denied their statutory and charter rights to equal and pro rata participation in their mutual association's net worth, surplus and reserves. (See pages 18-19 hereof) Bank Board's forfeitures were entirely retroactive and *ex post facto*.[50]

In its retroactive forfeiture orders said board made no specific findings of any individual guilt or innocence as to any one or more of the thousands of petitioner's innocent savings depositors it forfeited, or those it favored. Said board's only finding was:

> ". . . The Federal Home Loan Bank Board has determined that . . . said Merger Agreement . . . is advisable and in the interest of all concerned; and that the distribution . . . is fair and equitable;" [F.H.L.B.B. Order No. 17177 Pltf. Ex. 3-D-4].

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[50]Similar retroactive administrative orders have been held void and unenforceable by this Court and other Courts.

In *United States v. Baltimore & O. R. Co.*, 284 U.S. 195 76 L. ed. 243 (1931), this Court said at U.S. page 203, L. ed. page 247:

> ". . . . The Commission had no power to put this order into effect as of a prior day; . . . . Accordingly, the order did not become operative and was wholly ineffective."

To the same effect are:

Greene v. United States, 376 U.S. 149 at 160, 11 L. ed. 2d 576 at 584 (1964);

United States v. McCrillis, 200 F. 2d 884 at 889-890 (CA-1, 1952).

The District Court required an analysis of the size and status of each of the almost 1900 forfeited savings accounts. The District Court found (233 F. Supp. 578 at p. 599 Appx. I, footnote 4):

> ". . . 1,899 accounts [are] affected. Of that number, . . . 324 are $500.00 or less; 1524 are $11,000.00 or less; and only 54 are $100,000.00 or over. Thus, the greater number of *small account shareholders are punished* by the attempted deprivation than the larger shareholders. . . ." (emphasis added).

Respondents Bank Board, *et al.*, briefs and the Court of Appeals' opinion discussed only accounts of $20,000 or more per account. There are less than 150 of such accounts including the 54 over $100,000 each. But neither the Bank Board nor the Court of Appeals have mentioned or considered the punishment they impose on petitioners' thousands of innocent forfeited *small* savings depositors. Their federal statutory and charter rights to equal pro rata distribution are retroactively forfeited and taken from them without findings by the Bank Board and without discussion or consideration by the Court of Appeals.

It is not a crime or wrong, punishable by retroactive forfeiture, to be an innocent small co-depositor in a federal savings institution, with other larger depositors.[51]

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[51] 31.4% of *all* savings deposits in all savings and loan associations are in accounts of more than $10,000 each. There were more than 150,511 savings accounts of over $10,000 each in *only three* Los Angeles Associations. The total deposits in said 150,511 savings accounts exceed one and one-half billion dollars ($1,500,000,000). See page 14 hereof.

Petitioners asked the District Court for a *trial* on the merits. Instead, the District Court gave them a summary judgment.[52]

The Court of Appeals reversed. But instead of a remand for a trial on the merits it held "the District Court was without power to remedy what it regarded as an invalid distribution . . ." (CA-9, Opn. p. 17).

The final result is that the thousands of admittedly innocent small federal savings depositors are punished by retroactive forfeiture. Yet they have never been heard, or had any trial on the merits *anywhere.*

Respondent Bank Board expressly admitted that the small forfeited savings depositors have never been heard on the merits and will never be so heard.

Bank Board says ". . . Appellees cry out that the small depositors have never been heard on the merits. *This, of course, is true, . . .*" (emphasis added.)[53]

Respondent Bank Board made its retroactive forfeiture orders withiut any hearing or testimony.

The District Court set aside the forfeitures as illegal and void.

The Court of Appeals assumed the retroactive forfeitures were invalid but yet holds the District Court was without power to remedy them (CA-9, Opn. p.

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[52]Respondents provoked this summary judgment by failing to deny, as required by F.R.C.P. Rule 56, petitioners verified complaints and affidavits, exhibits, etc. The motions for summary judgment were then made by petitioners at the express order and direction of the District Court.

[53]Page 16 of respondent Bank Board's "Response of Federal Appellants To Appellee's Petition for Rehearing" filed December 26, 1967, pursuant to order of Court Appeals requiring such response.

20). It orders the actions dismissed and the invalid forfeitures enforced (CA-9, Opn. p. 21).

If the Court of Appeals' opinion stands, no U.S. Court can consider the punishment and penalties inflicted by Bank Board on thousands of innocent small federal savings depositors because of the alleged but untried wrongs of other larger depositors.

Forfeiture is punishment for a wrong or crime. To so punish the innocent without hearing or findings is a denial of due process of law and a violation of Amendment 5 of the U.S. Constitution.

Such "shotgun enforcement" of respondent Bank Board's vast powers cries out for judicial review. It should not be something "the District Court was without power to remedy . . ." (CA-9, Opn. p. 17).[54]

The Court of Appeals' opinion precludes all federal savings association depositors from any relief against the punishments and forfeitures of an illegal or void merger unless they sue and can enjoin the merger *before* it can take place. But such an injunction is impossible (see pages 36-38 hereof).

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[54]Respondents counsel at TR-122 referred to the large new savings depositors as "pickpockets." He later withdrew such epithet, but it discloses the attitude of Bank Board and their counsel.

In *Farmers v. United Electrical, etc.*, 211 F. 2d 36 (CA-DC, 1953) [Cert. Denied 347 U.S. 943, 98 L. ed. 1091], the N.L.R.B. denied all members of a labor union all their rights under the Labor Act. Such denial was solely because the Union's officers had not complied with a Board order. The D.C. Court of Appeals said at page 39:

> ". . . To impose this penalty upon the great mass of innocent union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets."

See footnote 9, page 9 for Bank Board Chairman's letter retroactively punishing innocent petitioners because they would not agree to said forfeitures.

The dangers of such holding are intensified by respondents 1966-1967 regulations.

Such present regulations authorize mergers without *any* prior notice to any of the thousands of mutual savings depositors in either of the merged federal savings associations.[55]

In the year 1966 at least twenty savings and loan associations ". . . were merged for supervisory reasons" (34th Annual Report of Federal Home Loan Bank Board to Congress for year 1966, page 80). Said report at pages 63-65 discusses 10 similar actions of respondent Federal Savings and Loan Insurance Corporation.

Bank Board mergers have taken place without any notice of any kind to any of the hundreds of thousands of mutual savings depositors in either of the merged federal mutual savings associations.[56]

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[55]12 C.F.R. Part 546 was amended by respondent Bank Board in 1966-1967. It now provides for mergers *without any notice* to the mutual savings depositors of the merged federal savings associations. 12 C.F.R. 546.2(d) and (e) now read:

"(d) Notwithstanding any other provision of this part, the Board *may, where it deems appropriate,* require that the plan of merger be submitted to the voting members of either or both associations at a duly called meeting or meetings and that the plan, to become effective, be approved by them.

"(e) A conservator or receiver appointed by the Board under Part 547 of this chapter may merge the Federal association in his possession with another association as provided in §§546.2 and 546.3 without submitting the plan of merger to the board of directors or to the members of the association for their approval." (emphasis added).

[56]In the Los Angeles-Long Beach, California area, on May 2, 1966, the $166,000,000 First Federal Savings and Loan Association of Alhambra was merged by respondent Bank Board into the $1,260,000,000 California Federal Savings and Loan Association. No prior notice of any kind of said merger was required to any of the thousands of First Federal Savings and Loan Association of Alhambra mutual savings depositors whose federal

(This footnote is continued on the next page)

Few, if any, of the twenty million people who are depositors in federal mutual savings associations in the United States know or realize that they *own* the seventy billion dollars of assets of their mutual associations. Nor do they know that their ownership includes their respective association's tens of millions of dollars of surplus and net worth.

Long Beach Federal depositors were more fortunate. Their vigilant depositors protective committee was active for 21 years. Such resulted in the $7,000,000 equal and pro rata distribution made to them in 1963 by the District Court and $2,500,000 more yet in Court to be distributed, or forfeited.

Respondent Bank Board has repealed the Acts of Congress which give all federal mutual savings depositors equal and pro rata rights.

In our Long Beach Federal merger the Board creates classes of forfeited and punished savings depositors and other classes who are favored and who take the forfeited shares of their fellow depositors.

Conclusion.

Innocence or guilt makes no difference.

Only Bank Board whim decides who among the innocent are punished by forfeitures and who are favored by receiving what has been forfeited. Only Bank Board whim decides whether the punished and forfeited

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mutual savings association thus disappeared. Nor was any notice required to the hundreds of thousands of California Federal Savings and Loan Association savings depositors who thus became the new co-owners of Alhambra Federal.

The last published Annual Financial Statement of First Federal Savings and Loan Association of Alhambra shows that it had net worth, reserves and surplus, of about $13,252,000 and total savings deposits of about $148,000,000.

The tens of thousands of First Federal Savings and Loan Association of Alhambra savings depositors owned their respec-

are innocent savings depositors of $100, $10,000 or $100,000 or more.

Under the Court of Appeals' opinion the U.S. Courts are "without power to remedy" such actions, unless the court judgments receive "Board and Commissioner approval".

Said arbitrary powers were denied to respondents by Congress in the Administrative Procedure Act and in the 1954 amendments to the "sue and be sued" sections of the Federal law creating respondent Bank Board. Yet nowhere does the Court of Appeals' opinion cite or discuss either of said statutes.

Respondents' forfeitures are repugnant to the United States Constitution Amendment Five and the repeated holdings of this Court. The writ should be granted to correct the dangerous precedent enshrining respondent administrative agencies as the supreme authority beyond all powers of the United States Courts and Congress.

Respectfully submitted,

CHARLES K. CHAPMAN,
Attorney for Petitioner Long Beach Federal Savings and Loan Association.

GEORGE W. TRAMMELL,
Attorney for Petitioner Elliott, et al., as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association.

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tive equal pro rata shares of said surplus, etc. It amounted to about $13,252,000 (about 9% of their respective savings deposits). They might have been able to attain for themselves an $18,000,000 or greater bonus distribution. Petitioner Long Beach Federal had but $72,000,000 of savings deposits. It got a $9,500,000 bonus distribution thereon.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit was filed August 18, 1967, and is not yet reported. A true copy of said Court of Appeals' opinion and Judgments is Appendix A of the Petition for Certiorari by Intervenor Ross filed concurrently herewith.

The opinion of the District Court (which is also its findings of fact and conclusions of law under F.R.C.P. Rule 52) was filed September 22, 1964. It is reported at 233 F. Supp. 578. A true copy thereof is Appendix I attached hereto.

All petitioners respectfully request This Court to consider both said petitions together. Various statements and contentions made in one are not repeated in the other.

APPENDIX "I".

UNITED STATES DISTRICT COURT OPINION.

233 F. Supp. 578

Pages 578-600.

Sidney ELLIOTT et al., Plaintiffs,

v.

FEDERAL HOME LOAN BANK BOARD et al., Defendants, N. Joseph Ross et al., Intervenors.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, Plaintiff,

v.

Sidney ELLIOTT et al., Defendants.

Sidney ELLIOTT et al., Cross-Claimants,

v.

FEDERAL HOME LOAN BANK BOARD et al., Cross-Defendants, N. Joseph Ross et al., Intervenors.

Sidney ELLIOTT et al., Plaintiffs,

v.

FEDERAL HOME LOAN BANK BOARD et al., Defendants.

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, Cross-Claimants,

v.

FEDERAL HOME LOAN BANK BOARD et al., Cross-Defendants.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, Cross-Claimant,

v.

FEDERAL HOME LOAN BANK BOARD et al., Cross-Defendants, N. Joseph Ross et al., Intervenors.

Nos. 63-1072, 63-1107, 63-1230.

United States District Court
S. D. California,
Central Division.

Sept. 22, 1964.

Action in interpleader and for declaratory relief involving provisions of agreement with respect to merger of savings and loan associations. The District Court, Hall, J., held that neither majority of shareholders of federal savings and loan mutual association, which was to be merged with state-chartered association, officers or directors of federal association, federal home loan bank, nor state-chartered association had power to prohibit any depositor who had pledged his shares on loan or any depositor of more than $10,000 after certain date from sharing at all in distributable surplus upon dissolution of federal association, provisions in merger agreement to that effect were void, and all shareholders were entitled to pro rata distribution of surplus.

Judgments accordingly.

George W. Trammell, Long Beach, Cal., for Sidney Elliott and Shareholders Protective Committee.

Moore & Lindelof, Los Angeles, Cal., for Equitable Savings & Loan Assn.

Charles K. Chapman, Long Beach, Cal., for Long Beach Federal Savings & Loan Association; Stanley Mosk, Atty. Gen. of California, San Francisco, Cal., for California Savings & Loan Comr.

Francis C. Whelan, U. S. Atty., Donald A. Fareed and James R. Dooley, Asst. U. S. Attys., Carl Eardley, Atty., Dept. of Justice, and Max Wilfand, Los Angeles, Cal., of counsel, for Federal Home Loan Bank Bd. and Federal Deposit Ins. Corp.

Pacht, Ross, Warne, Bernhard & Sears, by Harvey M. Grossman, Los Angeles, Cal., for intervenor N. Joseph Ross.

Blau & Schwartzman, Beverly Hills, Cal., for defendant Joseph Fields.

Fitzpatrick & Wiley, Los Angeles, Cal., for defendant and intervenor Richard Fitzpatrick.

HALL, District Judge.

There are preliminary and peripheral questions of jurisdiction, proper parties, and the like, but, in spite of the proliferation of documents and briefs on the separate motions of each party for summary judgment in these three actions, the central and ultimate question for decision is a limited one: Did the officers and directors of the Long Beach Federal Savings & Loan Association, and the Federal Home Loan Bank Board, or either of them, have the lawful power to alter the equal rights of all the depositors (sometimes called shareholders) in said Association so as to take the share of distributable assets on dissolution of said Association from several groups, and give that share to other groups defined in the Merger Agreement dated June 12, 1963, which groups had not ever been previously defined, or notified in any way at the time of deposit or pledge, by charter, statute, regulation or otherwise? An ancillary question as to whether or not the majority of the shareholders can thus affect the rights of any shareholder is also present.

It is to be noted at the outset that there is no claim of crime, fraud, illegality, or other wrongdoing against either Long Beach or Equitable Association, the officers and directors of either, or the Shareholders Protective Committee, or the shareholders of either Association, or any of them.

In order that the questions may be put in proper setting, it is necessary to recite some facts concerning which there is and can be no dispute.

[1] The Long Beach Federal Savings & Loan Association was chartered as a Federal Mutual Savings and Loan Association on July 10, 1934, under what is now 12 U.S.C. § 1464. Its first charter was replaced by its second charter on July 10, 1937 [12 U.S.C. § 1464], under which it has at all times since operated and still exists as a mutual association without any alteration or amendment. The charter was and is in the terms and language prescribed by the Federal Home Loan Bank Board, and was drawn and signed by that Government institution. All passbooks and receipts for deposits contained the terms of the charter by reference. From modest beginnings of $7,500 in deposits in 1934, it grew so that on May 20, 1946, it had deposits by shareholders of over 22 million dollars, and on that date, one Ammann was appointed conservator by the Bank Board, without notice, and he immediately seized the Association and its assets. A run developed at once. It resulted in the withdrawal of approximately ten million dollars from the Association within a few days. Litigation ensued between the newly formed State-licensed Shareholders Protective Committee (Plaintiff in Action No. 63-1072, and Cross-claimant in the other two Actions), the Association, the Bank Board, Ammann, and

others.[1] A Congressional investigation also was had. On January 24, 1948 the Association was returned to the shareholders and to the management selected by them, which was the same management as before the seizure, at which time (January 24, 1948) its deposits were down to approximately 13 million dollars, and the Association was heavily in debt. The Association continued under its previous management until April 22, 1960, when it was again seized by an Agent of the Bank Board, without notice. On that date, its deposits by shareholders had grown to 96 million dollars. Immediately after the seizure by the Bank Board's agent, another run occurred to the Association, which resulted in withdrawals which, in a short time, totaled over 60 million dollars, which was approximately 70 per cent of the total shareholders' savings deposits. More litigation and another Congressional investigation ensued, as well as prolonged negotiations for settlement of the various controversies. The negotiations resulted in a Settlement Agreement of about 100 pages in length, which was dated February 14th, 1962. The Agreement, among other things, called for the return of the Association to its former management, and the dismissal of all the suits which concerned the merits of the disputes between the Association and the Bank Board. It provided for the merger of Long Beach with Equitable Savings & Loan Association, a California State-chartered association, the dissolution of Long Beach, and distribution of its surplus on a pro-rata basis to its shareholders. The features of that Agreement concerned with the pending motions will be touched on later. Many, if not all, of the suits to be dismissed were class actions, and under F.R.Civ.P. 23, this Court concluded that the widest possible notice should be given, and it was, and the Court fixed April 2nd, 1962, for the return of the Association. On that date, its total savings deposits were down to approximately 30 million dollars. Upon return of the Association to its manage-

1. The cases filed in this court arising out of that and subsequent disputes with the Bank Board are cases numbered; 5421, 7989, 13953, 13979, 15888, 16772, 16773, 16774, 16775, 16845, 17133, 17152, 18905, 15-57, 378-58, 506-60, 462-61, 63-590, 63-1072, 63-1107 and 63-1230. The reported decisions cover more than 400 pages of the Federal Supplement and the Federal Reporter, 2d., as follows:

Mallonee v. Fahey (D.C.S.D.Calif.1946) 68 F.Supp. 418; Fahey v. Mallonee (1947) 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030; Ex Parte Fahey (1947) 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; Mallonee v. Fahey (D.C.1949) 14 F.R.D. 273; Home Loan Bank Board v. Mallonee (9 Cir. 1952) 196 F.2d 336, Cert. den. Mallonee v. Fahey, 345 U.S. 952, 73 S.Ct. 863, 97 L.Ed. 1374; Mallonee v. Fahey (9 Cir. 1952) 200 F.2d 918; Fahey v. O'Melveny & Myers (9 Cir. 1952) 200 F.2d 420, Reh. den. 12/17/52, Cert. den. 345 U.S. 952, 73 S.Ct. 863, 97 L.Ed. 1374, Reh. den. 345 U.S. 978, 73 S.Ct. 1120, 97 L.Ed. 1393; Fahey v. Calverley (9 Cir. 1953) 208 F.2d 197, Reh. den. 12/19/53, Cert. den. Utley v. Fahey, 347 U.S. 955, 74 S.Ct. 681, 98 L.Ed. 1100; Mallonee v. Fahey (D.C.S.D.Calif.1953) 117 F.Supp. 259; Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings & Loan Association (D.C.1954) 122 F.Supp. 401; Mallonee v. Fahey (D.C.1954) 122 F.Supp. 472; Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings & Loan Association (D.C.1954) 122 F.Supp. 960; Federal Home Loan Bank of San Francisco v. Hall, (9 Cir. 1955) 225 F.2d 349, Reh. den. 10/12/55, Cert. den. Mallonee, Bucklin & Fergus v. Federal Home Loan Bank of San Francisco, et al., 350 U.S. 968, 76 S.Ct. 438, 100 L.Ed. 840; Long Beach Federal Savings & Loan Association v. Federal Home Loan Bank of San Francisco (1955) 76 S.Ct. 32, 100 L.Ed. 1517; Ammann v. Home Investment Co. (9 Cir. 1957) 243 F.2d 748, 758; Long Beach Federal Savings & Loan Association v. Federal Home Loan Bank Board (D.C.1960) 189 F.Supp. 589; Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association (9 Cir. 1961) 295 F.2d 403, Reh. den. 11/17/61.

The Court takes judicial notice of such files and records and reported decisions, as well as the record of several hearings before, and reports of, Congressional Committees which investigated the disputes between the Long Beach Federal Savings & Loan Association and the Home Loan Bank Board.

ment, money again flowed to it as deposits so that in the first two days approximately 24 million dollars had been deposited, some in sums of over $100,000.00 and up. The deposits continued so that on June 30th, 1962, the total was 79 million plus dollars and on December 31st, 1962, the total deposits by the shareholders in the Long Beach Savings & Loan Association amounted to approximately 72 million dollars.

Prior to the April, 1960, seizure of that Association, and in late 1959, Long Beach had indicated to the Bank Board its desire to convert to a California State Building and Loan Association and become a part of the California State-chartered Equitable Savings & Loan Association. The negotiations had proceeded to a point where the California State examiners were in the Association on the date of its second seizure on April 22, 1960. After the seizure and during the negotiations resulting in the Settlement Agreement, the Association continued to indicate its desire to combine with Equitable and dissolve as a Federal mutual Association. Article XV of the Settlement Agreement is devoted to the detail of such conversion and dissolution of Long Beach by joining with Equitable Savings & Loan Association. After the return of the Long Beach Association to its management on April 2nd, 1962, the Association, Equitable and the Bank Board continued to negotiate the matter of such merger and conversion and the ultimate dissolution of Long Beach. The Merger Agreement dated June 12th, 1963, was the result of such negotiations. Until July, 1962, the Bank Board gave no indication of any desire that the shareholders were to share in the distributable assets other than on a pro-rata basis. But beginning in July, 1962, and until April, 1963, the Board "insisted" on a provision in the Agreement excluding all shareholders with over $100,000.00 on deposit from sharing in the distributable surplus, unless they were depositors in that sum on or before the second seizure, viz:. April 22nd, 1960.

This was the first indication by the Bank Board to anyone that the Bank Board desired to discriminate against any shareholder or treat any depositor other than on a mutual pro-rata basis as provided in the charter and the Settlement Agreement.

Long Beach officers and directors refused to accept this provision as not being in compliance with its charter or the law or the Settlement Agreement.

Then, in April, 1963, the Bank Board changed its position and, by the admission of the Government, "insisted" on the provisions in the Merger Agreement which are in dispute here, *and which would prohibit any depositor for any amount who has pledged his shares on a loan any place, and all depositors of over ten thousand dollars who were not such on April 22nd, 1960* (the date of the second seizure) *from sharing at all in the distributable surplus.*[2] The officers and directors of Long Beach refused to accede to this demand until the Bank Board consented to a provision in the Merger Agreement that any shareholder member could take appropriate action to contest the validity of the Merger Agreement or any part thereof. The text of the portion of the Merger Agreement in dispute follows:

"ARTICLE VII

"The rights of Long Beach shareholders to receive stock in Equitable or other benefits under this Agreement shall be computed as follows:

"Long Beach has required waivers of participation rights for all additions to savings accounts and for all new savings accounts after November 30, 1962. Each member's share account balance or balances as of that date shall be reduced by (1) the amount of any Long Beach share loan as of November 30, 1962, and/or

2. The Board had more than a "tendency to wobble" in its position. The phrase is borrowed from Judge Pope in Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Com'n (9 Cir. 1962) 310 F. 2d 606, at 611. See: Footnote 4.

the amount, as shown by the Long Beach books and records, for which each such share account was pledged or assigned, as of November 30, 1962, to any other person; (2) withdrawals from each such account subsequent to November 30, 1962, the last in, first out rule being applied to such withdrawals; and (3) the amount by which the total remaining balance or balances exceeds the sum of (a) $10,000 and (b) the balance or balances, if any, in such member's account or accounts on April 22nd, 1960.

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein.

"Long Beach and Equitable agree that no withdrawals made after the effective date of the Merger shall affect the right of any Long Beach shareholder hereunder as vested on said date, and said shareholders so withdrawing shall participate as fully as if such withdrawal had not been made.

"Each officer and director of Long Beach and Equitable shall participate in the distribution only to the extent of his respective share account as of April 22d, 1960, and shall furnish an affidavit to the Federal Home Loan Bank Board to the effect that he is not participating directly or indirectly in the distribution of Long Beach, except to the extent set forth in the proxy Statement.

"Members of the Shareholders Protective Committee, attorneys representing Long Beach, Equitable or the Shareh 'ders Protective Committee and close relatives of such persons, and close relatives of officers and directors of Long Beach and Equitable and corporate entities controlled by any of them, shall not participate in the distribution of stock as herein contemplated, except to the extent of the balances of such members' accounts in Long Beach as of April 22nd, 1960. Close relatives shall be deemed to mean spouses, children, parents, brothers, sisters, nephews, nieces and anyone married to one of the foregoing persons.

"The Board of Directors of Equitable will fix a record day for the determination of who are the stockholders and members entitled to notice and to vote at a special meeting of Equitable to consider its approval of this Merger Agreement or to consent to said Merger Agreement."

The first sentence of the second above-quoted paragraph is not in dispute. The effect of it was to fix November 30, 1962, as a "cut-off" date. It did not attempt to alter any shareholder's right without his consent, as is done in the second and succeeding sentences, around which this dispute centers.

The Bank Board had previously attempted to get Long Beach to accept a provision in the Settlement Agreement of February 14th, 1962, that the Association would "screen" and limit the size of deposits upon returning the Association and its assets to its elected management, but the Association refused to accede thereto, and there is no such provision in the Settlement Agreement. While Article XV of the Settlement Agreement, to which the Bank Board was a party, provided for the joinder of Long Beach Association and Equitable, and the dissolution of Long Beach, and pro-rata distribution of its surplus, no notice of any kind was given to the Association, its officers and directors, or its shareholders, or to the public, that the Bank Board would require preferred treatment for any shareholders before or at the time of the return on April 2, 1962, and not until July, 1962, when the Board indicated the above-mentioned demand that certain accounts of $100,000.00 and over forfeit any share in the distributable surplus; and no notice of any kind was

given to the Association, its Board of Directors, or officers, the shareholders, or the public that the Bank Board would require a forfeiture of all pledged accounts and all accounts over $10,000.00, of their right to share pro-rata in the distributable surplus of Long Beach, *until April, 1963*. On April 27, 1963, at a special meeting of the shareholders of the Association, a resolution was adopted condemning the attempt of the Bank Board to forfeit any shareholder's right to a proportionate share of the Association's net surplus, reserves, and undivided profits, and requesting Congress to again investigate the matter. This meeting was continued to June 15, 1963, and again continued to July 6, 1963, but the July 6th meeting was preceded by notice according to the charter, and by mailing to each shareholder or depositor a copy of the proxy statement containing a copy of the Merger Agreement dated June 12, 1963, and specially pointing out the dispute and the amount distributable under the Bank Board's demand and under the Association's claim. The dispute between the officers and directors of the Long Beach Association and the Bank Board, concerning the method of distributing the distributable assets, was fully discussed at that meeting, and the intention disclosed to file suit to insist upon pro-rata distribution to all shareholders rather than the discriminatory method preventing certain depositors from sharing at all in the distributable surplus, which the Government concedes the Bank Board "insisted" on being in the Merger Agreement. Proxies obtained by the Shareholders Protective Committee were voted by a written ballot which contained a provision that they were voted in favor of the Merger Agreement in reliance upon the provision therein which permitted any shareholder to litigate the right to receive distribution pro-rata. 99.4 per cent of those present in person or by proxy (constituting 64.4 per cent of all eligible shareholders) voted in favor of the Merger. The effective date of the merger was September 10th, 1963. On the same date, Case No. 63-1072-PH was filed in this court, and what is now Case No. 63-1230-PH was filed in the California Superior Court and later removed to this court. On September 17, 1963, Case No. 63-1107-PH was filed in this court. Each of the suits challenge the legality of the disputed provisions of Article VII of the Merger Agreement, and each seeks declaratory relief.

Other facts concerning which there is no genuine issue will be stated as may become necessary in the discussion of different questions of law.

[2,3] Inasmuch as all parties are before the Court in Action No. 63-1107-PH, each seeking the same relief sought by that particular party in each of the other actions, the remainder of this Memorandum will be addressed primarily to the issues raised on the Motions for Summary Judgment in Action No. 63-1107-PH. It is an action in interpleader and for declaratory relief. [28 U.S.C. §§ 1335, 1397, 2201, 2202, 2361; F.R.C.P. 22, 56(a), 57]. The plaintiff Equitable claims no interest of any kind in and to the subject matter of the action. It admits the duty to issue the shares of stock to someone; it has deposited that stock in court; and it seeks adjudication as to whom it should issue the disputed shares. There is a genuine dispute, which if unresolved in an action such as this, could result in a multiplicity of actions by the some 60,000 shareholders of Long Beach Association, which fact alone is sufficient to support an interpleader action. It is, thus, a true interpleader action, and not one in the nature of interpleader. And even if it were, the same rules apply as they are both equitable actions. [Burchfield v. Bevans (10 Cir. 1957) 242 F.2d 239; Holcomb v. Aetna Life Ins. Co. (10 Cir. 1955) 228 F.2d 75, Cert. den. 350 U.S. 986, 76 S.Ct. 473, 100 L.Ed. 853, Reh. den. 350 U.S. 1016, 76 S.Ct. 657, 100 L.Ed. 875].

[4] The subject matter of the action is the fund, thing, or duty to which the parties make adverse claims. [Degree of Honor Protective Ass'n v. Bisch (D.C.

Mass.1961) 194 F.Supp. 614]. Here, the stock in Equitable is the thing in dispute, and Equitable seeks to know its duty as to whom the stock should be issued. The stock exceeds in value the sum of $500.00, and is alleged to be in excess of nine million dollars,[3] and is deposited in this court. The court therefore has jurisdiction of the subject matter.

[5] There is requisite diversity among the claimants to the stock. [Treinies v. Sunshine Mining Co. (9 Cir. 1938) 99 F.2d 651, Aff. 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85]. While the Bank Board claims no monetary interest in or to any of the stock of Equitable which is the subject matter of the action, it nevertheless claims a right to direct to whom the stock should go. It and the Federal Savings and Loan Insurance Corporation are "sue and be sued" entities. [12 U.S.C. § 1464(d) (1); 12 U.S.C. § 1725(c) (4)]. This court thus has jurisdiction of the parties as well as the subject matter under the Interpleader Statutes of the United States.

The Cross-claimants and Intervenors, as well as Equitable, seek relief under the Declaratory Relief Statutes [28 U.S.C. §§ 2201–2202]. A summary judgment may be granted in such action [F.R.C.P. 56(a)], and the existence of another adequate remedy does not preclude a judgment in a declaratory relief action. [F.R.C.P. 57].

[6] The relief sought by the Cross-claimants and Intervenors in Action No. 63–1107–PH arises out of the same transaction and occurrence as gives rise to Equitable's suit in interpleader, viz.: the Merger Agreement and the disputes recognized therein and arising out of it, as to whom the disputed shares of stock in Equitable should issue. They are, therefore, proper parties under F.R.C.P. 13 governing cross-claims, and F.R.C.P. 24 relating to intervention.

[7, 8] The Administrative Procedure Act is applicable to the Bank Board, and its actions are judicially reviewable, and it does not have "uncontrolled discretion." [Home Loan Bank Board et al. v. Mallonee (9 Cir. 1952) 196 F.2d 336, Cert. den. Mallonee v. Fahey, 345 U.S. 952, 73 S.Ct. 863, 97 L.Ed. 1374; Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association (9 Cir. 1961) 295 F.2d 403]. That being so, the Plaintiff Equitable and each of the Cross-claimants and intervenors have standing to sue, and this court has jurisdiction of defendants Bank Board and Federal Savings and Loan Insurance Corporation under the terms of Section 10 of the Administrative Procedure Act [5 U.S.C. § 1009], particularly subdivision (c) thereof which provides that: "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

[9, 10] Even if this court did not have jurisdiction of the Bank Board and the Insurance Corporation on the original Complaint, under the Administrative Procedure Act and the Interpleader Statutes it does have undoubted jurisdiction on the Cross-claim of Long Beach, *and all the rights and duties of all the parties can, indeed, they must, be adjudicated if the rights and duties of the Association or of any one shareholder are adjudicated by way of declaratory relief.*

[11–13] The Cross-claim of Long Beach is a compulsory Cross-claim. It is well settled that jurisdiction of a counterclaim persists, even if the original action fails, where it is supported by an independent ground of federal jurisdiction. [Pioche Mines Consol. Inc. v. Fidelity-Philadelphia Trust Co. (9 Cir. 1953) 206 F.2d 336, Cert. den. 346 U.S. 899, 74 S.Ct. 225, 98 L.Ed. 400]. And it is equally well settled that a Cross-claim likewise will vest jurisdiction in the court if there is an independent ground of jurisdiction on the Cross-claim,

3. By stipulation, an Order was made for the distribution of about seven million dollars worth of stock which had been deposited in court, so that the disputed stock remaining is valued at something more than two million dollars.

regardless of jurisdiction or lack of it on the original action. [Pierce v. Perlite Aggregates, Inc. et al. (D.C.N.D.Calif. 1952) 110 F.Supp. 684, Aff. 226 F.2d 204]. To the same effect is Danner v. Anskis (3 Cir. 1958) 256 F.2d 123, at 124, and cases cited in Pioche Mines Consol. and Pierce, supra. And, as heretofore noted, both the Bank Board [12 U.S.C. § 1464(d) (1)] and the Federal Savings and Loan Insurance Corporation [12 U.S.C. § 1725(c) (4)] are "sue and be sued" entities. The Long Beach Association is seeking declaratory relief on its Cross-claim in Action No. 63–1107, and 12 U.S.C. § 1464(d) (1) grants jurisdiction to this court in the plainest of language, and grants authority to the Association to sue the Bank Board in this District "*with respect to any matter under this section or regulations made thereunder, or any other law or regulation.*" 12 U.S.C. § 1464(i) regulates conversion and dissolution of Federally chartered Savings and Loan Associations, such as Long Beach; and 12 U.S.C. § 1464(b) *provides for retirement of shares as provided in the charter of such an Association.* The Cross-claim of Long Beach is, therefore, a "matter under this section," i. e., Section 1464 of Title 12, United States Code.

[14, 15] The Savings and Loan Commissioner and the Bank Board contend that this is an un-consented suit against the State of California, and that, hence, this court has no jurisdiction of the California Savings and Loan Commissioner under the Eleventh Amendment to the United States Constitution. They further contend that he is an indispensable party, and that the suit must therefore be dismissed. The California Savings and Loan Commissioner issued his order permitting the merger according to the Merger Agreement of June 12, 1963 "*subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of Equitable as to which the ownership and entitlement are in dispute.*" He thus recognized that there was a dispute and that that dispute could and should be settled by a court of competent jurisdiction. By the terms of the Order, no other sensible conclusion can be reached, except that when such a judgment is made, he will abide by its terms. There is no doubt but that the State of California has consented to such a suit as this one in this court. The matter is set at rest by the provisions of F.R.C.P. 17(b) which specifically states that the capacity to sue *or be sued* shall be determined by the laws of the State where the District Court is held, and by the California Financial Code, § 5258, which provides for judicial review of every official act of the California Savings and Loan Commissioner "in accordance with law." The text of Section 5258 is as follows:

> "* * * Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner * * is subject to judicial review in accordance with law."

The fact that in other sections of the Financial Code of California, judicial review is limited to specified State courts [Section 9003—Superior Court; Section 7404—Supreme Court], whereas no such limitation is set forth in Section 5258, conclusively indicates that the review contemplated therein may be had in *any* court which otherwise has jurisdiction of the subject matter. Skokomish Indian Tribe v. France et al. (9 Cir. 1959) 269 F.2d 555, is thus not in point. As hereinbefore indicated, this court has jurisdiction of the subject matter, and by the above section of the California Financial Code, it has jurisdiction of the Commissioner. The Commissioner, in his order approving the merger, expressly consented to the determination "of any court of competent jurisdiction" as to the distribution of the stock "in dispute." Declaratory relief is a method of "judicial review in accordance with law." No specific consent is requisite to a suit for declaratory relief against public officials in California, designed to adjudge and declare the obligations of their Of-

fice. [County of Los Angeles v. State Dept. of Health et al. (1958) 158 Cal. App.2d 425, at 444, 322 P.2d 968, and cases cited therein.

The principle announced in 1839 in Clark et al. v. Smith, 13 Pet. 195, 38 U.S. 195, 10 L.Ed. 123, has never been modified or overruled, and has been reaffirmed and applied many times. The court there said (p. 202): "The State Legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts." California Financial Code, § 5258 created both the right and provided the remedy by permitting judicial review.

[16–18] The Eleventh Amendment does not permit a State official to divest one of rights federally granted or created. The rights of the shareholders in Long Beach were created by its Federally-granted charter. And a suit against an official of a State in such an instance (as is this) is not a suit against the State. [Reagan v. Farmers' Loan & Trust Co. (1894) 154 U.S. 362, 390–393, 14 S.Ct. 1047, 38 L.Ed. 1014; Sterling etc. v. Constantin et al. (1932) 287 U.S. 378, 393–394, 397–398, 53 S.Ct. 190, 77 L.Ed. 375; Ex Parte Young (1908) 209 U.S. 123, 159–160, 28 S.Ct. 441, 52 L.Ed. 714]. The property having been deposited in this court under the interpleader statutes, the Eleventh Amendment does not prevent the Federal court from declaring the rights and obligations of the parties, and enjoining the California Savings and Loan Commissioner from interfering with such declared rights. [In re Tyler (1893) 149 U.S. 164, 13 S.Ct. 785, 37 L.Ed. 689]. The State having consented to suit against its Savings and Loan Commissioner, it is unnecessary to discuss the proposition as to whether he is an indispensable party or a necessary party. Suffice it to say he is a proper party, and rightly so in this interpleader suit, equitable in nature, so that this court may finally and effectively dispose of the entire controversy which affects some 60,000 persons.

[19] It is not necessary to name the Savings and Loan Commissioner personally as F.R.C.P. 25(d) permits a public official to be sued as a party in his official title rather than by name.

[20, 21] While the Court has already made findings and an order (December 12, 1963) that the Shareholders Protective Committee and its members properly represent all the shareholders as a class, further comment is proper in view of the position of the Bank Board that such a Committee is not composed exclusively of persons who will benefit by the Bank Board's formula to create preferred classes of shareholders and exclude other classes from any share of the distributable surplus. It is not necessary for a class action that the persons representing the class shall have the same rights as one another; they may have unequal rights, or, indeed, they may have conflicting rights, [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909] but still be of a class [Chance v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 275, 23 Cal.Rptr. 761, 373 P.2d 849; Hink et al. v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 921, 23 Cal.Rptr. 771, 373 P.2d 859]. Regardless of the amount of the deposit by any shareholder, or the date thereof, or whether or not the account was pledged, the thing all shareholders have *in common is that they were depositors in Long Beach Federal Savings & Loan Association, under one common charter and one law authorizing the creating of the Association as a mutual institution, and received identical passbooks.* Here, there are 60,000 shareholders; obviously so numerous as to make it impracticable to bring them all before the court. Here, there has been the greatest possible notice to all the shareholders of the position taken by the Association and the Committee, including

a copy of the Complaint in Action No. 63–1072–PH, sent to each by mail, together with an order to show cause, fixing a time and place to object, if any one cared to object. One person showed up and objected, but has proceeded no further, and the Court must conclude that he is, and all the other shareholders are, content to have the matter adjudicated with the present parties, under the pleadings framing the issues. One Ross and several others showed up and asked that they represent themselves as intervenors rather than have the Committee represent them, but each asked the same relief sought by the Committee, i. e., pro-rata distribution of the distributable assets as provided by the Statute, the charter, and the Settlement Agreement. Except for the intervenors, not a single shareholder has appeared in this or any of the three actions objecting to either the position taken by the Shareholders Protective Committee or the individuals composing it, or the position taken by the Association. The only one who is objecting is the Bank Board, and it has and claims to have no pecuniary interest whatsoever in any of the property in custody of the court, which is the subject matter of this action and which belongs to the shareholders of Long Beach. F.R.C.P. 23 "does not require that all the members of the class be identically situated, if there are substantial questions either of law or fact common to all." [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909–914]. And the fact that no investor is objecting is a factor to be considered. Here, in this case, where process would be required to be served on approximately 60,000 persons, or separate suits filed, it is most appropriate to heed the admonition contained in the last cited case (p. 913) that: "Indeed, it has been suggested that 'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device,' and particularly of the 'spurious' class action provided by Rule 23(a) (3)." While that case holds that it is a question of fact to be tried, as to whether or not persons properly represent a class (with which there can be no quarrel), the undisputed facts related herein are sufficient for this court to form its judgment as a matter of law on the Motion for summary judgment. Moreover, it seems logical that "it is primarily for the shareholders" to determine what course they want to follow. [Denicke et al. v. Anglo-California Natl. Bank of San Francisco (9 Cir. 1944) 141 F.2d 285, Cert. den. 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592]. It cannot be overlooked that the Shareholders Protective Committee holds written proxies from more than a majority of the shareholders, and that all shareholders were advised of the position of the Shareholders Protective Committee and the Association, before the Merger Agreement was signed, and that the same Committee is and has been licensed by the State of California for 18 years, and that the Committee has participated on behalf of the shareholders in all of the long series of litigation and in the Settlement Agreement. I hold that the Shareholders Protective Committee properly represents all the shareholders as a class, under F.R.C.P. 23. In this connection, it must be kept in mind that the members of the Shareholders Protective Committee, and the intervenors are also suing *individually* as shareholders and depositors in the Association, and they have a right to have their individual rights declared, and in doing so, the court cannot escape the determination of the rights of all shareholders in order to determine the rights of one, so that any one not a party to this action could, under F.R.C.P. 71, enforce those rights "by the same process as if he were a party."

I come now to the controlling question set forth at the beginning of this Memorandum. I have read the briefs of the parties, and the cases cited. Most of the cases are wide the point. I am satisfied, and hold, that the Officers and Directors of the Association, and the Bank Board, or either of them, or the majority of the shareholders did not have the lawful power to alter the pro-

rata rights of shareholders from that set forth in the law, the charter, and the Settlement Agreement, and that the provisions of the Merger Agreement which attempt to do so are void.

[22] The Long Beach Federal Savings & Loan Association was created by the grant of a charter to it under the terms of what is now 12 U.S.C. § 1464. That statute provides that such Association shall be *"mutual,"* [12 U.S.C. § 1464(a)]; it requires that "[s]uch associations shall raise their capital only in the form of payments on such shares *as are authorized in their charter, which shares may be retired as is therein provided,"* [12 U.S.C. § 1464(b)]; it permits such Associations to lend their funds "or the security of their shares" [12 U.S.C. § 1464(c)]; the Bank Board is given power to make rules and regulations [12 U.S.C. § 1464(d) (1)], and it is a proposition well established in the law that such regulations or rules or other action of the Board cannot be contrary to the Statute, or in excess of the powers granted by the Statute. As stated by the Supreme Court in Manhattan General Equipment Co. v. Commissioner of I.R.S. (1936) 297 U.S. 129, at 134, 56 S.Ct. 397, at 400, 80 L.Ed. 528:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 265 U.S. 315, 320–322, 44 S.Ct. 488, 68 L.Ed. 1034; Miller v. United States, 294 U.S. 435, 439, 440, 55 S.Ct. 440, 79 L.Ed. 977, and cases cited."

The Statute in 12 U.S.C. § 1464(i) provides for conversion to a State Association and dissolution by two methods: one, upon vote of not less than 51 per cent of the shareholders voting at a meeting specially called for that purpose, and the other, by negotiation which does not contemplate approval by vote of the shareholders. Inasmuch as the Board required approval by a vote of a majority of the shareholders at a meeting specially called for that purpose (Board Order No. 17,777 dated June 14, 1960 Exhibit 3–d–3), it must be concluded that the Board and the Association were proceeding under the provisions for merger and dissolution by vote of the shareholders [second unnumbered paragraph of 12 U.S.C. § 1464(i)], which does not require approval of the Board [Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association et al (3 Cir. 1960) 277 F.2d 437], and not under the provisions set forth in the third unnumbered paragraph of that sub-section upon such "equitable" basis as may be approved by the Bank Board. The second unnumbered paragraph of 12 U.S.C. § 1464(i), under which the conversion and dissolution is had, contains the *second* Congressional expression in the Statute as to the distribution of stock upon conversion and dissolution. It reads: "(6) *that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits.*" This provision is in addition to the specific requirement of subsection (b) *that the shares are to be retired as provided in the charter.* And the charter written, signed and issued by the Government requires a pro-rata distribution on dissolution.

[23–25] Several provisions of the charter issued to the Association by the Bank Board are pertinent. Section 9:

> "* * * All holders of share accounts shall be entitled to equal distribution of net assets, pro-rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Association."

Section 3 of the charter provided that the Association has the power "to wind up and dissolve, merge, consolidate, or reorganize in the manner provided by law and rules and regulations made thereunder." The Bank Board contends that by the provisions in Section 3 of the charter, permitting dissolution "in the manner provided by law and rules and regulations made thereunder," gave the Board the power to make the disputed preferences and forfeitures "insisted" on by the Bank Board. The proposition that a special provision in a contract (and the charter is a contract not only between the Bank Board and the Association, but between each shareholder and every other shareholder—Dartmouth College v. Woodward, 4 Wheat. 518, 17 U.S. 518, 4 L.Ed. 629)—prevails over a general one, is so well known as not to require citation by authority. Any rule or regulation made by the Board (if it could be called a rule or regulation) for winding up or merger and dissolution thus cannot prevail over the specific provision in the charter and the statute that distribution shall be made pro-rata to shareholders in the event of dissolution. Especially is this so in view of the requirement that the Association shall be *mutual*. Article 16 of the charter provided that no amendment to the charter shall be made unless proposed by the Directors of the Association. Such directors never made any proposal to amend the charter so as to prefer any class of shareholders over any other, as "insisted" by the Board. Nor did the Bank Board.

[26] There can be no doubt but that the provisions "insisted" on by the Bank Board would prefer one class of shareholders over another, and destroy the mutuality of the shareholders, and this, without prior notice to those who deposited their money after April 22, 1960, or who pledged their accounts.

Title 12 C.F.R. 563.3 provides in its pertinent part:

> "* * * *Every* share, membership, or deposit certificate, *passbook*, or other instrument evidencing a withdrawable investment hereafter *issued* by an insured institution, which pays or proposes to pay a different rate of dividends or interest upon different classes or shares or securities, *which prefers or proposes to prefer, either as to time or amount of participation in* earnings or *assets* (except by way of a bonus plan), *any one or more classes of shares* or securities, * * * *must*, unless the corporation (FDIC) specifically permits omission of one or more of such recitals, *include in its provisions, and display in easily read* type, a full and understandable statement of the *method* * * * *or the dividend provisions, or both, under which the institution operates, and* the *charge* or charges, if any, *for* the *privilege* of becoming, remaining, *or ceasing to be a saver or investor in the institution.*"

All depositors, at all times before as well as after April 22nd, 1960, were issued an identical passbook, the text of which was approved by the Bank Board. *Nothing* is said in the passbook, and indeed, no notice was given to any shareholder at the time he deposited his money, whether in the sum of one hundred dollars or one million dollars, or at, or before he pledged his account, that any depositor who pledged his account would forfeit his right to share pro-rata with all others, or that if the deposit was in excess of $10,000.00, he would forfeit his pro-rata share. The Bank Board are bound by their own regulation, unless changed in the manner prescribed by the Administrative Procedure Act [5 U.S.C. § 1003]. The above-quoted regulation has never been changed. The Bank Board cannot ignore this regulation. [Service v. Dulles et al. (1957) 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403; United States ex rel. Accardi v. Shaughnessy (1954) 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681]. Furthermore, all depositors were given, or had made available to them, an identical copy of the charter which, as above indicated, calls for pro-rata distribution, and which, it is worthy

to repeat, constituted a contract by each shareholder with every other shareholder.

In addition to the charter provision for pro-rata distribution upon dissolution, the provisions of the Settlement Agreement dated February 14th, 1962, are important. That Agreement was about two years in the process of negotiation. Article XV thereof devotes six pages to the matter of the proposed merger of Long Beach with Equitable and its dissolution. It is not denied that throughout the negotiations the Bank Board unsuccessfully attempted to get the officers of Long Beach to limit accounts which would come in after the return of Long Beach to its elected management. But the Agreement contained the following provisions with relation to distribution of surplus or net assets on dissolution:

"XV(h)—After the assumption by Equitable of said aggregate principal amount of all Long Beach share accounts and after the payment or the making by Long Beach of provision for payment of all creditor and other liabilities, the net surplus, reserves and undivided profits of Long Beach shall be distributed as and when available to Long Beach shareholders of record at the close of business of the date (herein called 'Approval day') on which such plan shall be approved by the members of Long Beach as follows:

"(i)—Each such shareholder shall be entitled to such part of the amount of such distribution as the dollar value in principal of his share account at the close of business on Approval Day bears to the total dollar value in principal of all Long Beach share accounts at the same time (not including said adjusting dividends in the computation). Each such shareholder shall be given written notice of his proportionate share as soon as practicable after Approval Day.

"(ii)—Such distribution shall be made from time to time, as directed by the Long Beach Directors subject to the next following sub-paragraphs (iii), (iv), (v), and (vi), until the total net surplus, reserves and undivided profits and any other remaining assets of Long Beach have been collected, converted into cash, and distributed according to such plan."

The Settlement Agreement thus followed the terms of the charter. It incorporated the entire agreement of the parties. It was relied upon by the subsequent action of the Long Beach Association and its shareholders in dismissing the many actions therein mentioned, and by Equitable. If the doctrine of estoppel has any place in this case, it is more properly invoked in favor of the Association and its shareholders, rather than against them.

[27] The Government's assertion that Mr. Gregory, President of Long Beach, orally promised to "screen" the accounts is denied by Mr. Gregory, but it is immaterial whether it is true or not as Gregory had no such power.

[28] The Order of the Bank Board of March 22, 1962 (No. 15681) made pursuant to Article XI of the Settlement Agreement, provided specifically that: "(3) All rights, powers and privileges of said Association's members, officers and directors are restored." No restriction of any kind was placed on securing new "members" (shareholders), and it thus follows that any one who became a member or shareholder after the return of the Association had exactly the same rights as every other previous member. They were issued a passbook approved by the Bank Board, which was identical to all previously issued passbooks.

The Government asserts that every Federally chartered Association takes its charter subject to any changes that may be made by law. What Congress can do is one thing, but what the Bank Board can do is quite another. The changes here "insisted" on by the Bank Board were not by Congress, but by the Bank Board, and were, in fact, contrary to the

Statute, to the charter issued by the Bank Board, its own Settlement Agreement, and contrary to its own regulations.

[29] The Statute provided for the Association to be a *mutual* Association, and in a mutual Association preference cannot be given to one depositor or shareholder over another. In Intermountain Building & Loan Ass'n et al. v. Gallegos et al. (9 Cir. 1935) 78 F.2d 972, at 980, the Court said: "The pledge of the assets of a building association for the retirement of a certain class of its stock, in preference to others, is so violative of the elementary requirements of equality and *mutuality* as to be absolutely void." (Emphasis added).

In Pacific Coast Savings Society v. Sturdevant (1913) 165 Cal. 687, 133 P. 485, 49 L.R.A.,N.S., 1142, the California Supreme Court had occasion to comment on the overriding necessity of equality of treatment to depositors or shareholders in a mutual institution. It said, at page 692, 133 P. at page 487:

"* * * we think the better view is that followed by the court below, namely, that when the corporation becomes insolvent all stockholders, including those who have given notice, pursuant to the by-laws, of withdrawal, stand upon an equal footing. The theory upon which this view is to be sustained is well stated in the following quotation from Endlich on Building Associations (2d Ed.) § 514: 'The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements and all rules and by-laws must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted on a basis of strict mutuality, equality, and fairness. To permit one member, or one set of members, to be paid in full at the expense of others who get less, is not to carry out that scheme or agreement, unless there is something which gives the former an equity superior to the latter, whereby they have a better and stronger claim upon the property of the association. Where one has subscribed to and paid up stock upon a distinct understanding that it is to be preferred over others that have paid less, there is such a superior equity. But there is nothing in the mere fact that one has given a certain number of days' notice that he wants his money, whereby he is, ipso facto, invested with an equity to receive it superior to that of one who has not given such notice. There is therefore nothing to counter-balance, much less outweigh, the inequitableness, of permitting him to take the fund belonging to his fellows in order to pay himself.' And the learned author goes on to quote with approval the following declaration of the Supreme Court of Pennsylvania in Christian's Appeal, 102 Pa. 184, 189: 'When a building association has failed to fulfill the objects of its creation and has become hopelessly insolvent * * after expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the funds should be distributed, *pro rata*, among those whose claims are based upon stock of the association, whether they have withdrawn and hold orders for the withdrawal value thereof or not.'"

[30] And while the charter may be subject to changes by Congress, in the public interest, there are limitations in that respect also. In Treigle v. Acme Homestead Ass'n (1936) 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575. The Court had under consideration a statute of Louisiana which attempted to alter the

rights of previously existing shareholders in the proportion to be paid to them. The Court held it void, and said, at page 196, 56 S.Ct. at page 411:

"The provision is comparable to a statute declaring that whereas preferred stockholders heretofore have enjoyed a priority in the distribution of assets, in that respect they shall hereafter stand *pari passu* with common stockholders. Such an interference with the right of contract cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation."

See Also: Huntington v. Savings Bank (1877) 96 U.S. 388, 24 L.Ed. 777; Hamilton Natl. Bank v. District of Columbia (1946) 81 U.S.App.D.C. 200, 156 F.2d 843–846.

[31] The provisions "insisted" on by the Bank Board not only are contrary to the Statute, the charter, the Settlement Agreement and their own regulations, but they also violate the private contracts made by the shareholder with the Association when such shareholder pledged his account. Numerous regulations of the Bank Board implement the provisions of 12 U.S.C. § 1464(c) permitting shareholders to borrow on the security of their shares. All the loans which would be affected by the Bank Board's "insisted" provisions, were made long before the Bank Board ever asserted the right to penalize such borrowers by cutting them out of any distribution of the surplus. The form for assignment of the passbooks for the purpose of pledging such account for loans was prescribed by the Board. The Board cannot now ignore it, and alter the mutual obligations between the borrower and the Association by penalizing the borrower simply because he borrowed.

[32] The Government contends that in the event the court does not agree with its position, the court must remand the matter to the Bank Board. The position is not well taken for the reason that the action of the Bank Board, being out of harmony with, and contrary to, the law, the charter, the Settlement Agreement, and the Bank Board's own regulations, is a nullity. [Manhattan General Equip. Co. v. Commissioner I. R. S., supra]. Hamilton Natl. Bank v. District of Columbia (1946) 81 U.S.App.D.C. 200, 156 F.2d 843, quoted with approval Manhattan General Equip. Co. v. Commissioner, supra, but remanded the case to the local taxing authorities to carry out their judgment. In that case a remand was required to permit ministerial acts of tax calculations. Here, there is nothing to remand.

[33] The contested provisions of the Merger Agreement are either in compliance with the law or they are not. It is my opinion that they are not and that they are a "mere nullity." The Bank Board proposed the language, and agreed to the insertion of the provision that the validity of *any part* of the Agreement could be contested. It was notified, in advance of its approval of the Merger Agreement, that the Association and the Shareholders Protective Committee were going to contest the validity of the disputed provision of the Agreement, and that probably Equitable would file a suit in interpleader. The Bank Board nevertheless approved the Merger Agreement with the provision permitting legal testing of *any part* thereof, and *thereafter notified the parties to the Agreement and the Savings and Loan Commissioner of the State of California that its Resolution No. 17,177 [Exhibit 3(d) (5)] approving the Agreement was "satisfied."* In reliance upon the provision of the Merger Agreement permitting legal testing of any part of it, and in reliance upon the notification that its Resolution

approving the Agreement was "satisfied," the parties proceeded to and did complete the merger, and immediately filed the suits to contest the validity of the disputed provisions of the Agreement.

The only sensible conclusion one can reach is that, like the California Savings and Loan Commissioner, the Bank Board agreed to be, and is, bound to abide the judgment of a court of competent jurisdiction. This court is a court of competent jurisdiction. It has jurisdiction of the subject matter and the parties, and there is nothing further the Bank Board can do even if the matter were remanded.

This is not a case for review of the rule-making power under 5 U.S.C. § 1003; and it is not a case under 5 U.S.C. § 1004 concerning adjudicatory powers, as there was no hearing, no findings, just the order of the Bank Board and its admitted "insistence" on having the objected-to provisions in the Agreement. It is somewhat analogous to the action of the Secretary of the Interior in striking an Indian's name from the allotment list and cancelling the certificate which had theretofore been issued. The Supreme Court required the restoration of the name to the rolls and the restoration of the certificate by mandamus. But here, there is nothing to mandamus. Nevertheless, the comments of the court are pertinent. It said—Garfield v. United States (1908) 211 U.S. 249, at page 262, 29 S.Ct. 62, at page 66, 53 L.Ed. 168:

> "In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In Miller v. United States (1935) 294 U.S. 435, at page 440, 55 S.Ct. 440, at page 442, 79 L.Ed. 977, the court stated: "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." Here, the purpose of the Act is to establish *"mutual"* building and loan associations, the shareholders or depositors of which should stand *equally* in all rights. The provisions "insisted" on by the Bank Board do not do that, but create retrospective and retroactive classes of shareholders, and give them preference over others whose rights are illegally forfeited. And this without any previous notice and contrary to their own regulations and the terms and intent of the Statute.

[34] While I am satisfied that there is no genuine issue as to the fact that the shareholders ratified the Merger Agreement in reliance upon the right and the declared purpose to bring legal proceedings to enforce pro-rata distribution, if that conclusion were not warranted, and if, as contended by the Bank Board, the 64.4 per cent of the eligible shareholders voted to approve the Merger Agreement in reliance on the preferential treatment for certain classes as "insisted" on by the Bank Board, such provision in the Agreement would nevertheless be void. This, for the reason that the majority stockholders cannot appropriate a minority shareholders' interest in property belonging to a corporation, to the detriment of minority stockholders. [Lebold et al. v. Inland Steel Co. (7 Cir. 1942) 125 F.2d 369, Cert. den. 316 U.S. 675, 62 S.Ct. 1045, 86 L.Ed. 1749]. See also: Southern Pac. Co. v. Bogert et al. (1919) 250 U.S. 483, 39 S.Ct. 533, 63 L.Ed. 1099;

Pepper v. Litton (1939) 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281; Jackson v. Ludeling (1874), 21 Wall. 616, 88 U.S. 616, 22 L.Ed. 492.

[35] I conclude that neither the majority of the shareholders, nor the officers and directors of Long Beach, nor the Bank Board, nor Equitable, acting singly or in concert, had the power to make the forfeitures and preferences as set forth in the contested provisions of the Merger Agreement; that such provisions are void, as a matter of law; that no remand is required to be made to the Board; and that all shareholders, regardless of the size or date of deposit and regardless of any pledge of their shares, are entitled to a pro-rata distribution of the distributable surplus of the Long Beach Association.

The Bank Board relies heavily on Fahey v. Mallonee (1947) 332 U.S. 245, 67 S.Ct. 1552, but that case involved the right of the Bank Board to appoint a conservator to take charge of the entire assets of the Association, and did not in any way involve the taking of one shareholder's property and money, and giving it to another, as the Bank Board attempted to do here.

In Reich et al. v. Webb et al., decided August 18th, 1964, 336 F.2d 153, the Ninth Circuit said, as to one of the holdings in Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association (3 Cir. 1960) 277 F.2d 437: "Basically the holding stands for nothing more than a declaration that substantive liability cannot be created by the Bank Board apart from statute, a proposition with which we fully agree." In this case, the provisions in the Merger Agreement "insisted on" by the Bank Board attempt to create substantive liability against all those whose deposits exceed $10,000.00, or who have pledged their stock for loans, and in favor of all those who do not fall within those categories.

[36, 37] The Bank Board claims the plaintiffs and cross-complainants and intervenors are estopped from challenging the validity of the disputed provisions. This is not so for several reasons: first, the Board proposed the language in Article VII to the effect that any shareholder could contest the validity of the Agreement or any part of it, and the Association and the shareholder, in their meetings, relied upon that proposal by the Board and acted on it. So did the Savings and Loan Commissioner of the State of California. Secondly, the Association did nothing to induce the Bank Board to put the disputed provisions in the Agreement, but by admission of defendants, the Bank Board "insisted" on the disputed provisions, and consented to the provision permitting a suit to test the validity of the Merger Agreement "or any part thereof." And the law does not prevent a shareholder from accepting such benefits as may be accorded him by a dissolution or merger, and also from suing for what he claims is his lawful right to have. [Lebold et al. v. Inland Steel Co. (1943) 125 F.2d 369, Cert. den. 316 U.S. 675, 62 S.Ct. 1045].

The parties have filed affidavits and counter-affidavits ranging over a wide field of facts and conclusions other than covered and found herein. But none of such facts in said affidavits and counter-affidavits, other than as stated herein, are necessary or material to a decision of the whole case, and the facts as stated herein are material and without any genuine issue, and are all that are material or necessary to a decision that the plaintiffs, cross-complainants and intervenors are entitled to the judgment herein indicated that the disputed provisions in the Merger Agreement are illegal and void, and that the action of the Bank Board in "insisting" on them as a condition of the merger was arbitrary and contrary to, and without authority in, law.[4]

4. Because the Court has had some difficulty in following the positions of the Bank Board, some comment should be made with relation thereto: A decision thereon is not necessary to the conclusions reached here. It is claimed that the Board "insisted" on the provisions because of their "concern" over the flow

While this Memorandum is primarily addressed to Action No. 63–1107–PH, a further examination of the pleadings and Motions for summary judgment in Cases No. 63–1072–PH (to which Equitable has consented to be a party, and for which an order will be signed when presented), and No. 63–1230–PH, demonstrates that the facts found herein as material to a decision of the whole case are true, without any genuine issue thereto, and the legal conclusions herein stated are equally applicable to and controlling as to each of said latter numbered cases, without further findings, conclusions, or discussion.

Pursuant to the provisions of F.R.C.P. 52, the findings of fact and conclusions of law stated herein are sufficient so as not to require any findings of fact or conclusions of law in any of the three cases.

Counsel for the prevailing parties will prepare, submit, and serve judgments in

of money into the Association in large deposits after its return on April 2, 1962. But the Affidavit of Professor McMurray, former Chairman of the Bank Board, shows that in July, 1962, when they first demanded exclusion of accounts of $100,000.00 and over, their "concern" *was not over* the *inflow* of funds, *but* over the *outflow* of money from the institution. His affidavit states:

> "In July, 1962, during the merger negotiations, the Long Beach management advised the Bank Board that approximately $7,000,000 had been *withdrawn* from the Association after the June 30, 1962 dividend. *The Board became concerned about this situation.*" [Paragraph 6 of the Affidavit]. (Emphasis supplied).

The Board insists that the large deposits "diluted" the share of surplus which would go to the small depositors. It is unnecessary to decide that, but it is worthy of note that several hundred of the accounts, whose right to share would be forfeited because they were pledged, are for less than $500.00, and that the 42 million dollars additional deposits which were in the institution on December 31, 1962, gave the Association a decided tax advantage in enabling it to write off, under the then existing laws, 12½ per cent of that amount, viz.: more than five million dollars, as bad debt reserve. And five million dollars contributing to a tax shelter is not tiddlywinks. The Bank Board contends that Equitable did not offer three million dollars for the good will of Long Beach because the good will of Long Beach was not worth that much. This, in the face of the affidavit of Mr. Palmer, an officer of Equitable, who sat through all the negotiations, and in the face of the uncontroverted offer of Equitable at the shareholders' meeting of April 27, 1963, to pay three million dollars as a bonus for the good will of Long Beach. Whether this is so or not is unnecessary to decide.

Throughout the merger negotiations and since these suits were filed, the position of the Bank Board is precisely contrary to the public statements of Professor McMurray as Chairman of the Board (now resigned) which reflected an almost trapezical agility to shift, depending on whether or not he was talking to a Congressional Committee, to the public, or to Long Beach Federal. Professor McMurray testified that all Federal mutual depositors share alike on dissolution, whether they have been in the system one year, ten years, or 20 years, when he appeared before the House Committee on Appropriations on January 24, 1963. And on May 7, 1963, he testified before the House Committee on Banking and Currency that all depositors in Federal mutuals were treated alike, whether $100.00 or $100,000.00, and whether pledged or not; and in a public speech in New Orleans on March 2, 1964, he again emphasized the necessity for *equality* of treatment in Federal mutuals.

The Bank Board seems to base its position on the fact that pro-rata distribution will hurt the little account and help the big one. At the Court's suggestion, a tabulation was made of the accounts in different amounts which would be deprived of sharing in the distributable surplus if the Board's formula were applied. It is Exhibit 13 attached to the Motion for Summary Judgment of Plaintiffs and Cross-complainants. It shows a total of 1,899 accounts affected. Of that number, 1,000 are less than $10,000.00; 324 are $500.00 or less; 1524 are $11,000.00 or less; and only 54 are $100,000.00 or over. Thus, the greater number of small account shareholders are punished by the attempted deprivation than the larger shareholders. As heretofore stated, none of these facts are material to the decision reached.

each of the three cases in accordance with the conclusions and decisions herein expressed. If not too much of a burden, it would be preferable to spell out in the judgments the exact amount of each shareholder account (using a code number) and the exact amount of shares in Equitable to which that account is entitled.

APPENDIX "II".

CONSTITUTIONAL AND STATUTORY PROVISIONS.

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United States Constitution (part only)

"Amendment 5

"No person . . .shall be . . .deprived of life, liberty, or property, without due process of law . . ."

§ 1464. Federal Savings and Loan Associations—Organization authorized

(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

Capital; deposits; certificates of indebtedness

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

TITLE 12 U.S.C. §1464 (d)(1) (part only)

"(d)(1) . . .The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. . . .The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail to the Federal Home Loan Bank Board, Washington, District of Columbia." 1/

1/ In 1963 said District Court action Nos. 63-1072-P.H., 63-1107-P.H., and 63-1230-P.H., were filed. 12 U.S.C. §1464(d) then read as above quoted. It was amended in 1966 with changes not here material. But the savings clause of such amending enactment expressly provided that no such amendments should affect any pending actions. It reads:

> "(b) The amendment made by subsection (a) of this section shall be effective only with respect to proceedings commenced on or after the date of enactment of this Act. Section 5(d) of the Home Owners' Loan Act of 1933 as in effect immediately prior to the date of enactment of this Act shall continue in effect with respect to any proceedings commenced prior to such date."

(Section 101(b) of Pub. L. 89-695, 1966, PP. U.S.C.A. Title 12 §1461 to end, page 16).

TITLE 12 U.S.C. §1464 (i)

"(i) . . .

"Any Federal savings and loan association may convert itself into a savings and loan type of institution organized pursuant to the laws of the State, District, or Territory (hereinafter referred to in this section as the State) in which the principal office of such Federal association is located: *Provided*, (1) That the State permits the conversion of any savings and loan type of institution of such State into a Federal savings and loan association; (2) that such conversion of a Federal savings and loan association into such a State institution is determined upon the vote in favor of such conversion cast in person or by proxy at a special meeting of members called to consider such action, specified by the law of the State in which the home office of the Federal association is located, as required by such law for a State-chartered institution to convert itself into a Federal association, but in no event upon a vote of less than 51 per centum of all the votes cast at such meeting, and upon compliance with other requirements reciprocally equivalent to the requirements of such State law for the conversion of a State-chartered institution into a Federal association; (3) that notice of the meeting to vote on conversion shall be given as herein provided and no other notice thereof shall be necessary; the notice shall expressly state that such meeting is called to vote thereon, as well as the time and place thereof, and such notice shall be mailed, postage prepaid, at least twenty and not more than thirty days prior to the date of the meeting, to each member of record of the Federal association at his last address as shown on the books of the Federal association and to the General Manager of the Federal Savings and Loan Insurance Corporation, Washington, District of Columbia; (4) that, upon the effective date of the conversion, the association has repurchased the total amount invested in its shares by the Secretary of the Treasury; and (5) that if, upon the effective date of conversion, the Home Owners' Loan Corporation will hold of record shares of the association, its approval of the conversion has been obtained; (6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits; (7) that such conversion shall be effective upon the date that all the provisions of this chapter shall have been fully complied with and upon the issuance of a new charter by the State wherein the association is located; it being provided that its act of converting into a State-chartered institution shall constitute an agreement to be bound by all the requirements that the Federal Savings and Loan Insurance Corporation may legally impose under section 1726 of this title, and the association shall upon conversion and thereafter be authorized to issue securities in any form currently approved at the time of issue by the Federal Savings and Loan Insurance Corporation for issuance by similar insured institutions in such State, District, or Territory.

In addition to the foregoing provision for conversion upon a vote of the members only any association chartered as a Federal savings and loan association, including any having outstanding shares held by the Secretary of the Treasury or Home Owners' Loan Corporation, may convert itself into a State institution upon an equitable basis, subject to approval, by regulations or otherwise, by the Federal Home Loan Bank Board and by the Federal Savings and Loan Insurance Corporation: *Provided*, That if the insurance of accounts is terminated in connection with such conversion, the notice and other action shall be taken as provided by law and regulations for the termination of insurance of accounts. "

TITLE 5 U.S.C. §1009 (c) and (e)

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243. 2/

2/ In September, 1966, Congress by Pub. L. 89-554, 80 Stat. 392, revised and re-enacted Title 5 of the U. S. Code. Old §1009 was divided into new sections 701 and 702 through 706. The "Explanation" (page v of 1967 Edition of Title 5) says in part:

> ". . .the enactment . . . did not involve substantive changes in the law, . . ."

The language above quoted became 5 U.S.C.A. §701(a), §704 and §706.

The opinion of the District Court refers to 5 U.S.C. §1009 as it was numbered up to September, 1967. Hence we quote it under its old number.

TITLE 12 U.S.C. §1725 (c)(4) part only

"(c) . . . the [Federal Savings and Loan Insurance Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power--

". . .

"(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia."

12 C.F.R. Part 546.4

PART 546--MERGER, DISSOLUTION, REORGANIZATION, AND CONVERSION

" . . .

§ 546.4 Voluntary dissolution.

The board of directors of any Federal association may propose a plan for the dissolution of such association. Such plan may provide for (a) the Federal Savings and Loan Insurance Corporation to be appointed, in accordance with the provisions of section 406 of the National Housing Act, as amended, and section 5, Home Owners' Loan Act of 1933, as amended, and pertinent regulations of such corporation, as receiver for the purpose of liquidation; (b) all assets of the association to be transferred to another thrift and home-financing institution under Federal or State charter for a sufficient amount of cash to pay all obligations of the association and to retire all outstanding share accounts up to the amount credited thereto; (c) the transfer of all assets to another thrift and home-financing institution under Federal or State charter in consideration of the payment of all outstanding obligations of the association and the issuance of share accounts or other evidence of interest to the members of the Federal association on a pro rata basis; or (d) dissolution in such other manner as may be proposed by the directors and which to them appears to be to the best interest of all concerned. Such plan shall thereupon be submitted to the Board for approval, together with a statement of the reasons for proposing dissolution and the reasons for the plan submitted. If it appears to the Board that dissolution is advisable and that the plan of dissolution submitted is in the interest of all concerned, the Board will approve the plan; if the plan submitted appears to be inadvisable, the Board will either make recommendations to the association concerning the plan or disapprove it. When a plan of dissolution has been approved by the board of directors of a Federal association and by the Board, such plan shall be submitted to the members of such association at a duly called meeting and, when approved by a majority of the votes cast at such meeting, shall become effective. When dissolution has been consummated in accordance with the plan approved by the Board, a certificate evidencing that fact, supported by such evidence as the Board may require, shall forthwith be filed with the Board. Upon receipt of evidence satisfactory to the Board that such dissolution has been so consummated, the Board will terminate the corporate existence of the dissolved Federal association and its charter shall thereby be cancelled.

CALIFORNIA FINANCIAL CODE, SECTION 5258

§ 5258. Acts of commissioner subject to judicial review: Time for commencement of proceedings. Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2, and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. Except for review of proceedings conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, an action or proceeding for judicial review pursuant to this section must be commenced within 60 days after the issuance of such order, decision, approval, certificate, license or permit, or within 60 days after such denial, or other official act, or within 60 days after the effective date of this section, whichever is the later date.

CALIFORNIA FINANCIAL CODE, §9204

§ 9204. Transfer in whole or in part of assets by domestic association to federal association, or by federal association to domestic association: Vote of directors necessary: Ratification of stockholders and shareholders necessary: Conformity to United States laws and regulations of the Federal Home Loan Bank Board required. Any domestic association may transfer its engagements, funds, and property, in whole or in part, to a federal savings and loan association, or any federal savings and loan association may transfer its engagements, funds, and property, in whole or in part, to any domestic association, upon such terms as may be agreed by the affirmative vote of at least a majority of their respective directors, ratified, in the case of the contracting domestic associations by the vote or written consent of stockholders holding in the aggregate more than two-thirds of the outstanding stock and by the vote or written consent of shareholders holding in the aggregate more than two-thirds in value of the outstanding shares, and in the case of a contracting federal savings and loan association by the consent, in writing or by vote, prescribed by the laws of the United States and the regulations of the Federal Home Loan Bank Board applicable thereto.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1119

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

Respondents.

Petition of Intervenor N. Joseph Ross for Certiorari to the United States Supreme Court.

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

Respondents.

Petition of Intervenor N. Joseph Ross for Certiorari to the United States Supreme Court.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner N. Joseph Ross, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 18, 1967.[1]

[1]A separate Petition for Certiorari is being filed concurrently herewith on behalf of the other petitioners named in the caption.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit was filed August 18, 1967, and is not yet reported. A true and correct copy of the Court of Appeals' opinion is annexed hereto as Appendix A. The opinion of the District Court (S.D. Calif.) is reported at 233 F. Supp. 578 and is also annexed as Appendix I to the companion petition for certiorari being filed by Long Beach Federal Savings and Loan Association, *et al.*

Grounds of Jurisidiction.

The opinion of the Court of Appeals for the Ninth Circuit, reversing the judgment of the United States District Court for the Southern District of California in three related cases (consolidated for disposition on appeal) was filed August 18, 1967, and the judgments of the Court of Appeals (one in each of the three consolidated cases) were filed and entered as of that date. A timely petition for rehearing was filed in behalf of Long Beach and its Shareholders' Protective Committee and received by the Court of Appeals on September 14, 1967. An order permitting the filing of the petition was subsequently made on September 20, 1967 and confirmed on January 12, 1968. On the latter date, the court made an order denying said petition for rehearing without opinion. A copy of the Court of Appeals' opinion, judgments, and order denying rehearing are annexed hereto as Appendix A. Jurisdiction of this Court on certiorari is based upon 28 U.S.C., Section 1254(1).

Constitutional and Statutory Provisions Involved.

The Constitutional and Statutory Provisions involved are:

United States Constitution, Fifth Amendment;
12 U.S.C., Section 1464(a);
5 U.S.C., Sections 704, 706 (former Sec. 1009 (c)(e)).

Each of the foregoing provisions is set forth in Appendix II to a Petition for Certiorari being filed concurrently herewith by the other petitioners herein (Long Beach Savings and Loan Association, *et al.*).

Statement of the Case.[2]

The present case arises out of the merger of Long Beach Federal Savings and Loan Association (hereinafter "Long Beach"), a federally chartered mutual savings and loan association, into Equitable Savings and Loan Association (hereinafter "Equitable"), a California state chartered savings and loan association, and out of the actions of the Federal Home Loan Bank Board (hereinafter "Bank Board") with respect thereto.[3]

By reason of the merger and under the terms of the Merger Agreement, the shareholder depositors of Long

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[2]A more comprehensive statement of the case is contained in the separate Petition for Certiorari being filed concurrently in this matter by Long Beach Savings and Loan Association and its Shareholders' Protective Committee, to which Petition the Court's attention is respectfully invited.

[3]Petitioner N. Joseph Ross, one of the shareholder members of Long Beach, intervened in these actions in the trial court and has participated in subsequent proceedings. See discussion, *infra.* He has elected to file a separate petition for certiorari pursuant to Rule 46.

Beach were to receive shares of Equitable stock commensurate with their share balances in Long Beach as of a specified date. At the insistence of the Bank Board, the Merger Agreement contained certain provisions whereby specified categories of Long Beach shareholders were precluded from participating in such Equitable stock[4] despite provisions of the Long Beach Charter (Section 9) which assured pro rata distribution of assets to all members of Long Beach "in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Pltf. Ex. 19].

The excluded categories consisted of:

1: Those shareholder depositors whose accounts had been pledged as of a specified date, and

2. Recent accounts in excess of $10,000.00 [Pltf. Ex. 12/9/63—10 A, pp. 47-48].

Anticipating a challenge to the exclusionary provisions by and on behalf of the excluded shareholders, the Merger Agreement expressly provided:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validi-

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[4]The Bank Board based its action on asserted new money coming into Long Beach during the period. Long Beach and the Shareholders Committee contended this new money was of great value and benefit to the Association. Since the case was disposed of by the District Court on summary judgment, this issue has never been tried. Nor did the Court of Appeals base its decision on this ground; since it found the Bank Board's action immune from judicial review, it did not reach the merits of the Board's action and indeed could not do so on the record before it.

ty of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (Emphasis added). [Pltf. Ex. 12/9/63—10 A, p. 47].[5]

The Merger Agreement—containing the above provision—was approved by the Bank Board and the California Savings and Loan Commissioner (hereinafter the "Commissioner"), whereupon the merger was consummated on September 10, 1963. (233 F. Supp. 578 at 587). As anticipated, a legal challenge to the exclusionary provisions of the Merger Agreement was asserted forthwith in the form of three actions, two filed September 10, 1963, and the third September 17, 1963.

The first of these actions (No. 63-1072 PH), described as one to quiet title and for declaratory relief, was brought in the United States District Court, Southern District of California, Central Division (now Central District), by Long Beach and four individuals constituting the Shareholders' Protective Committee, the latter suing as individuals, as the Committee and as representatives of the entire class of Long Beach shareholders. Jurisdiction of the District Court was invoked under 28 U.S.C. §§1331 and 1391(e) and 12 U.S.C.

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[5]The Bank Board agreed to the insertion of the provision that the validity of any part of the agreement could be contested. (See Findings of United States District Court, 233 F. Supp. 578, 596). (The District Court treated its Memorandum Opinion as incorporating its findings of fact and conclusions of law; see 233 F. Supp. at 599).

The ballots by which the Long Beach shareholder members approved the Merger Agreement expressly stated that they were cast in reliance upon the aforesaid provision (See Opinion of Court of Appeals, p. 7; District Court Findings, 233 F. Supp. at 587).

§§1464(a), 1464(b), 1464(c), 1464(d) and 1725 [1 R. 1, 3, 4].[6]

The second action, which was also one to quiet title and obtain declaratory relief, was filed in the California Superior Court by the same individuals, suing in the same capacity as were plaintiffs in the district court action filed on the same day. The defendants in this action are the Bank Board, Equitable, Long Beach and "John Does 1 through 70,000". On October 10, 1963, the Bank Board removed this action to the District Court, where it was docketed as No. 63-1230 PH. Jurisdiction of the District Court was invoked under 28 U.S.C. §§1441 and 1442(a)(1) [2 R. 1].

The third action (No. 63-1107-PH) was filed in the District Court by Equitable against the Shareholders' Protective Committee, the Bank Board, Long Beach and some individual Long Beach shareholders. This action was described as one in interpleader and for declaratory relief. Jurisdiction of the District Court was invoked under 12 U.S.C. §§1464, 1464(d), 1725, 28 U.S.C. §§1331, 1335, 1397, 2361, F.R.C.P. Rule 22, and the District Court's general equity interpleader powers [3 R. 2].

During the course of the trial court proceedings, the Commissioner was added as a party defendant in Civil Actions Nos. 63-1107 PH and 63-1230 PH. Equitable was added as a party in Civil Action No. 63-1072 PH.

N. Joseph Ross, the present petitioner, being one of the shareholder depositors of Long Beach who would be excluded from participating under the above exclusion-

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[6]For record reference explanation see footnote 8.

ary clauses, sought and obtained leave to intervene in all three actions and has participated in subsequent proceedings[7] [1 R. 343, 409; 2 R. 425, 506; 3 R. 322, 392].[8]

The basic issue in the three actions concerned the validity of the exclusionary provisions which, it was contended, contravened the terms of the Long Beach Charter and the applicable provisions of law, including congressional enactments, and thereby exceeded the authority of the Bank Board.

It was subsequently stipulated that some 585,000 shares of Equitable stock (the pro rata shares of those not within the exclusionary clauses) might be distributed forthwith [3 R. 167, 180, 307]. Further proceedings were then had directed to the remaining shares of Equitable stock (in excess of 200,000 shares) being the portion which on a pro rata basis would have gone to those members of Long Beach which the Merger Agreement purported to exclude from participation.

Long Beach, the Shareholders' Committee, Equitable and Intervenor Ross thereupon moved for summary judgment, seeking a judicial determination that the exclusionary provisions were invalid as a matter of law and that pro rata distribution of the Equitable

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[7]The Court of Appeals does not make express mention of Intervenor Ross but his intervention and the role he has played in these proceedings is amply reflected in the record of the trial court and on appeal (See, *e.g.*, Trial Court Opinion, 233 F. Supp. at 583).

[8]References in this brief to the original papers in No. 20378 (D.C. No. 63-1072 PH), No. 20447 (D.C. No. 63-1230 PH) and No. 20522 (D.C. No. 63-1107 PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr.". Citations to the Court of Appeals' Opinion (Appendix A hereto) will be designated "C.A. Op."

stock should be made to all of the Long Beach shareholder depositors as provided in the Long Beach Charter. The Bank Board (and the California Savings and Loan Commissioner) moved for summary judgment on the ground that the challenge to the exclusionary clauses should be rejected as a matter of law and the actions dismissed [3 R. 874, 997, 1238, 1272].

On May 17, 1965, the District Court rendered judgments which in effect granted the motions for summary judgment of Long Beach, the Shareholders' Committee, Equitable and Intervenor Ross and denied the summary judgment motions of the Bank Board and Savings and Loan Commissioner [1 R. 697; 2 R. 907; 3 R. 1642]. The District Court declared the exclusionary provisions void and ordered pro rata distribution, on the grounds, *inter alia*:

> (1) By 12 U.S.C. §1464(a), Congress required all Federal Savings and loan associations to be mutual.[9] Equality is the essence of every mutual association. The moment one group of depositors is favored and all others are excluded, the association is no longer a mutual association.

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[9]Section 1464(a) provides:

"In order to provide local *mutual* thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local *mutual* thrift and home-financing institutions in the United States." (Emphasis added).

(2) The Long Beach Charter required that each of the shareholder members of Long Beach receive his pro rata share of Equitable stock.[10]

(3) The Bank Board cannot forfeit the interests of Intervenor Ross and the other shareholder members of Long Beach by an edict issued after their deposits were made and without prior notice to said shareholder depositors at the time of their deposits.[11]

The Bank Board and Commissioner thereupon appealed from the three judgments (each judgment was substantially similar) to the Court of Appeals for the Ninth Circuit; the three appeals (Nos. 20378, 20447 and 20552) were consolidated for briefing and argument and disposed of collectively in a single opinion by the Court of Appeals. On August 18, 1967, the latter court rendered its opinion and decision to which

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[10]Section 9 of the Charter reads in pertinent part:

"9. . . . *All* holders of share accounts shall be entitled to *equal distribution* of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." (Emphasis added). [Pltf. Ex. 19].

[11]The trial court also indicated that the Bank Board's approval was not required for the merger—a point to which the Court of Appeals devotes a large portion of its opinion. In our view, this question is not crucial here, since even assuming, *arguendo*, that Bank Board approval of the merger were required, this would not render the Board's action immune from effective judicial review.

A copy of the District Court Opinion is annexed as Appendix I to the companion Petition for Certiorari filed by Long Beach, *et al.*, and is also reported at 233 F. Supp. 578, *sub nom., Elliott v. Federal Home Loan Bank Board.* The judgments of the District Court, which are quite voluminous, are included in the Transcript on Appeal [1 R. 697; 2 R. 907; 3 R. 1642].

the present petition for certiorari is directed (Appendix A). (Petition for rehearing was denied January 12, 1968).

The Court of Appeals reversed the judgments below and remanded the three cases to the District Court with directions to dismiss the actions on the ground that even assuming that the District Court was correct in determining that the exclusionary provisions of the Merger Agreement were invalid, no remedy was available to Long Beach, the Shareholders' Committee or the excluded shareholders, including Intervenor Ross.

In arriving at this rather startling result—which in effect denies the federal courts' statutory power to correct unconstitutional, illegal and void administrative action—the Court of Appeals reasoned as follows:

> 1. The exclusionary provisions of the Merger Agreement cannot be stricken without setting aside the entire merger, because:
>
> (a) The merger required Bank Board (and Commissioner) approval and the merger as so approved cannot be altered by the court. Nor can the court remand the matter to the Bank Board, as the Bank Board (and Commissioner) lack power to review and consider provisions of a merger plan "except in performance of their function to approve or disapprove the merger plan as a whole" [C.A. Op. p. 20).
>
> (b) The merger required shareholder approval and any alteration would require a resubmission

to the shareholders, which would be impractical at this stage.[12]

2. The entire merger cannot be set aside because in failing to seek injunctive relief in advance of the merger, the excluded shareholders were guilty of laches.[13]

However plausible the foregoing argument might appear at first glance, on analysis we believe it is fallacious in a number of respects:[14]

1. It rests on the false premises that:

(a) The District Court was making a revised distribution plan (whereas it merely held the Charter and Acts of Congress controlling);

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[12]The District Court reasoned that the majority shareholders could not abrogate the pro rata rights of the minority and their attempt to do so was void; under this analysis, no further action of the shareholders would seem necessary once the void exclusionary clauses were stricken. Moreover, the shareholders were aware at the time they approved the merger that the right to challenge it in whole or in part existed. As the Court of Appeals itself notes (C.A. Op. p. 7): "Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon that portion of the new Article VII of the merger agreement which reads: 'This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein.'" [Pltf. Ex. 12/9/63-4].

[13]The Court of Appeals also suggests laches is a bar even if no setting aside of the entire merger would be required. Apparently this is based on the assumption (erroneous we believe) that shareholders' approval still would be required.

[14]While we believe the District Court was correct in rendering summary judgment in favor of the excluded shareholders, including Intervenor Ross, had the Court of Appeals merely determined it was not a proper case for summary judgment and reversed for a plenary trial, we could not in good conscience have requested a hearing before this Court. That is not, however, the nature or basis of the Court of Appeals' decision, as is apparent from its direction that the actions be dismissed.

(b) The federal courts (and the Bank Board) are without power to review or nullify an invalid provision of a merger agreement without setting aside the entire merger.

2. Conversely, it fails to give due recognition to the doctrine of severability and to the express severability clause in the Merger Agreement.

3. It misapplies the doctrine of laches.

The net effect of the foregoing errors is to:

1. Render the Bank Board largely immune from effective judicial review; and

2. Deprive the excluded shareholders of Long Beach of their pro rata share of Equitable stock without either an administrative or judicial hearing—contrary to the dictates of procedural due process.

As a result, Intervenor Ross and the many other Long Beach shareholders in the excluded categories are foreclosed from challenging what is tantamount to a forfeiture of their interests, despite the fact that:

1. They had no notice of possible exclusions at the time they made their deposits.

2. No plenary trial has been held on the validity of the exclusionary clauses in question.

3. The District Court, on motions for summary judgment, found the exclusionary clauses in excess of the Board's powers and invalid; and

4. The Court of Appeals itself did not find either the exclusionary clauses or the Bank Board's actions with respect to them valid or lawful but regarded itself as powerless to act, in the mis-

taken belief that no judicial review of the exclusionary clauses of the Merger Agreement or the Bank Board's action requiring such exclusions would lie.

Importance of Case.

The result reached by the Court of Appeals is not only unjust to Intervenor Ross and the other excluded shareholders of Long Beach, but establishes what we believe to be a dangerous precedent insofar as the Bank Board is concerned and one which could readily be applied to other areas of administrative action. Insofar as the Court of Appeals purports to take comfort in certain decisions of this Court, it has made, we believe, a gross misapplication of those decisions in a manner which could not have been intended and should not be sanctioned by this Court.

At the same time, it poses a dilemma to the shareholder members of a federally chartered savings and loan association. Under the reasoning of the Court of Appeals, whenever a shareholder depositor seeks to challenge the distribution provisions of a merger agreement he must—to avoid laches—seek to enjoin the merger.

Aside from other practical difficulties in launching such an attack, it would create serious and perhaps disastrous consequences for the association and all of its shareholders. By thus foreclosing any possibility of "limited war" (*i.e.*, a post-merger challenge to the distribution provisions) the decision below places the courts in a position where they must either:

1. Increase the vulnerability of mergers to shareholder attack—a course which may invite a rash of "strike suits"; or

2. Routinely reject such attacks, thereby depriving the injured shareholder of the only recourse ostensibly open to him.

Neither choice is a happy one, and an opinion which forces the courts to elect between these alternatives is, we submit, highly suspect in terms of sound judicial policy.

Questions Presented.

This case presents questions of major importance in the area of judicial review of administrative agencies (particularly the Federal Home Loan Bank Board) and of procedural due process:

I.

DOES THE COURT OF APPEALS' OPINION UNDULY RESTRICT THE SCOPE OF JUDICIAL REVIEW OVER THE ACTIONS OF THE FEDERAL HOME LOAN BANK BOARD RESPECTING MERGERS OF FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATIONS AND THEREBY ESTABLISH A DANGEROUS PRECEDENT IN FORECLOSING EFFECTIVE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

A. *Does the Court's Power to Effectively Review a Merger and the Bank Board's Power to Act With Respect Thereto End Once the Merger Is Effected?*

B. *Was the Court of Appeals Correct in Holding That No Judicial Relief Was Possible From Invalid Exclusionary Clauses in a Merger Agreement Which the District Court Found to Exceed the Bank Board's Powers?*

C. *Was the Scope of Judicial Relief Available Limited to a Pre-Merger Injunction?*

D. *Did the Court of Appeals Misapply the Decisions of This Court in Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947), and S.E.C. v. Chenery Corp., 318 U.S. 80, 88 (1943)?*

Comment:

The Court of Appeals has unduly restricted—indeed practically foreclosed—effective judicial review of the Bank Board's action in requiring what is tantamount to a forfeiture whereby certain Long Beach shareholders are excluded from receiving their pro rata share of Equitable stock.

If the Court of Appeals' opinion is permitted to stand, it will establish a dangerous precedent in an important area of administrative action.

II.

CAN MEMBERS OF A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION BE DEPRIVED OF THEIR PRO RATA SHARE OF STOCK RECEIVED UPON A MERGER WITHOUT ADVANCE NOTICE, AN ADMINISTRATIVE HEARING, OR JUDICIAL REVIEW?

A. *Is Such Deprivation Consistent With the Letter or Spirit of the Federal Administrative Procedure Act or With Federal Due Process Standards?*

Comment:

The shareholder depositors of Long Beach were not advised at the time of their deposits that they would forfeit their pro rata interests if they pledged their accounts or deposited in excess of $10,000.

The Bank Board—without giving the excluded shareholders a hearing—has insisted on such a forfeiture and the Court of Appeals now holds that the federal courts are powerless to remedy it.

III.

MUST SHAREHOLDERS WHO WISH TO CHALLENGE EXCLUSIONARY CLAUSES OF A MERGER AGREEMENT SEEK TO ENJOIN OR SET ASIDE THE ENTIRE MERGER DESPITE AN EXPRESS SEVERABILITY CLAUSE?

IV.

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT THE BANK BOARD, AS WELL AS THE FEDERAL COURTS, WAS POWERLESS TO REMEDY THE INVALID EXCLUSIONARY CLAUSES ONCE THE MERGER HAD BEEN APPROVED AND CONSUMMATED?

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals' Opinion Establishes a Dangerous and Erroneous Precedent in Foreclosing Effective Judicial Review in an Important Area of Administrative Action.

Recent opinions of this Court have reflected an acute awareness of the dangers of administrative absolutism and the corresponding need to enforce meaningful controls.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967);

National Labor Relations Board v. Brown, 380 U.S. 278, 291-292 (1965);

Harmon v. Brucker, 355 U.S. 579, 581-582 (1958).

The same philosophy is reflected in the Federal Administrative Procedure Act, 5 U.S.C. §§551 *et seq.* (former §§ 1001 *et seq.*).

The Court of Appeals' opinion runs counter to this trend of authority by rendering an important administrative agency—the Federal Home Loan Bank Board—largely immune from judicial scrutiny.

Under the Court of Appeals' opinion, the only effective attack on an invalid exclusionary clause in the distribution provisions of a merger agreement is a challenge to the entire merger prior to its consummation by means of a suit for injunctive relief.

Once the merger is consummated there can be no partial nullification, while a setting aside of the merger in its entirety will be barred by laches and the practical difficulties such an undertaking would entail.

This is so in the present case, says the Court of Appeals, even though the Merger Agreement itself expressly provides:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (Emphasis added).
>
> *233 F. Supp. 586.*

The action for injunctive relief which the Court of Appeals recommends is in most cases hardly a meaningful or effective remedy, as the present case amply demonstrates:

1. A challenge to the merger and the delay thereby entailed might well jeopardize the association and all its shareholders. Such action—which at best would be financially hazardous and at worst conducive to "strike suits" (see *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949)) —is hardly to be commended. In effect the excluded shareholder is forced to adopt a "dog in the manger" attitude. Permitting a post-merger challenge to the exclusions would entail a more realistic and less destructive approach. Yet the Court of Appeals in effect forecloses such a middle course.

2. The plaintiffs in such an injunction suit normally would be required to post a huge undertaking as a condition of interim relief. For example, in the present case, the combined assets of Equitable and Long Beach at the time of the mer-

ger amounted to well over $150,000,000.00 [Pltf. Ex. 12/9/63-10A p. 43]. An injunction bond (F.R.C.P. §65(c)) to indemnify the thousands of Long Beach depositors and Equitable depositors and shareholders against the millions of dollars potential damage which might be sustained in the course of a lengthy lawsuit, if the injunction proved wrongful, would be beyond the capability of any shareholder or shareholder group. The suggested remedy of injunction is therefore an illusory one.

3. The District Court itself is placed in a procedural straight jacket and forced to choose between two highly undesirable alternatives without being able to adopt a feasible middle course. This runs counter to the philosophy recently enunciated by this Court in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), where the Court stresses the need for a flexible approach in tailoring remedies to meet the needs of a particular case.

The only practical alternative is to permit a post-merger challenge to the invalid exclusionary provisions.

Such a challenge—and the possible resulting holding of invalidity—does not do violence to the concept of administrative approval, particularly where, as here, the administrative agency in question (the Bank Board) has overstepped its jurisdiction by inserting invalid exclusionary clauses in excess of its authority.[15] The

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[15]For example, suppose that instead of excluding pledged accounts the Bank Board had required the Merger Agreement to provide for exclusion of members of a particular ethnic, religious or racial group. Can anyone doubt that such a provision could and should be stricken by the Court whether or not it struck down the remainder of the merger?

addition of such invalid provisions—outside the scope of the Board's authority[16]—should properly be regarded as a nullity.

Recognition of such partial invalidity would be consistent with the terms of the Merger Agreement and with the dictates of sound policy, insofar as it would make for effective review of the Bank Board's action. Such effective review appears contemplated by the Federal Administrative Procedure Act. Thus, 5 U.S.C. §§ 704 and 706 (formerly §§ 1009(c) and (e)) provide in pertinent part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ." (5 U.S.C. § 704)
>
> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> "(1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;

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[16]In view of the approach adopted by the Court of Appeals, it must be assumed here, as it was by the Court of Appeals, that the exclusionary provisions were invalid, as found by the District Court.

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law; . . ." (5 U.S.C. § 706)

The District Court itself noted the pertinence of the Administrative Procedure Act:

> "The Administrative Procedure Act is applicable to the Bank Board, and its actions are judicially reviewable, and it does not have 'uncontrolled discretion.' [Home Loan Bank Board et al. v. Mallonee (9 Cir. 1952) 196 F. 2d 336, Cert. den. Mallonee v. Fahey, 345 U.S. 952, 73 S.Ct. 863, 97 L.Ed. 1374; Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association (9 Cir. 1961) 295 F.2d 403]. That being so, the Plaintiff Equitable and each of the Cross-claimants and intervenors have standing to sue, and this court has jurisdiction of defendants Bank Board and Federal Savings and Loan Insurance Corporation under the terms of Section 10 of the Administrative Procedure Act [5 U.S.C. §1009], particularly subdivision (c) thereof which provides that: 'every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.'" 233 F. Supp. at 588.

Nor was the District Court contriving a "revised distribution plan," as the Court of Appeals suggests (C.A. Op. p. 17). The District Court was merely enforcing the terms of the Long Beach Charter and the mandate of Congress, both of which were deemed to require pro rata distribution of the Equitable stock among the Long Beach depositors.

In holding to the contrary, the Court of Appeals relies on three decisions of this Court which we believe to have been misapplied here, namely:

Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952);

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947); and

S.E.C. v. Chenery Corp., 318 U.S. 80, 88 (1943).[17]

S.E.C. v. Chenery, 318 U.S. 80, *supra*, involved proceedings to review an order of the Securities and Exchange Commission approving a plan of reorganization for a Public Utility Holding Company whereby certain preferred stock was not permitted to participate on an equal footing with other preferred stock. The Court, in holding the order erroneous, refused to sustain it on the basis of determinations which the agency alone could have made but which it had not in fact made. Since the agency purported to base its action on judicial doctrines, it was held that its actions must be so judged on review, and judged by those standards the Court concluded the agency was in error.

Neither the result reached in *Chenery* nor the Court's reasoning in that case would appear to sanction the course followed by the Court of Appeals here.

In *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, *supra*, the Federal Power Com-

[17]In view of the approach adopted by the Court of Appeals, it must be assumed here, as it was by the Court of Appeals, that the exclusionary provisions were invalid, as found by the District Court.

mission had authorized a hydro-electric project on condition the licensee permit use of its electric lines by the United States. The Court of Appeals held the Commission had no authority to attach such a condition and ordered it stricken. In declaring this erroneous, the Court stated that the function of the reviewing court ended when an error of law was laid bare and that the court should then have remanded the case to the Commission for reconsideration.[18]

In the present case, the Court of Appeals did not direct that the case be remanded to the Bank Board for reconsideration. In fact, it *held the Board powerless to take any further action.*

Moreover, the Court of Appeals apparently overlooked a crucial passage in the *Idaho Power* case wherein *the Court distinguished such a situation as that presented by the instant case* with the following observation:

> ". . . There doubtless may be situations *where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. . . .*" 344 U.S. at page 20. (Emphasis added).

In view of the express severability clause in the present case, the District Court's action appears to fall squarely within the above language.

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[18]The Court went on to review the merits of the Commission's action and found it proper.

Aircraft & Diesel Equipment Corp. v. Hirsch, the third case relied on by the Court of Appeals, merely involved a failure to exhaust administrative remedies under the Renegotiation Acts.[19]

II.

The Excluded Shareholder Members of Long Beach, Including Intervenor Ross, Have Been Deprived of Procedural Due Process.

The Court of Appeals has rendered an opinion which is inconsistent with the demands of procedural due process.

As a result of the Court of Appeals' opinion, numerous shareholder members of Long Beach, including Intervenor Ross, are excluded from obtaining their pro rata share of Equitable stock despite the fact that:

1 The Long Beach shareholders were not notified at the time of their deposits that in the event of a merger they would not receive their pro rata share in accordance with the mutual nature of the Association and the provisions of the Long Beach Charter noted above.

2. The Bank Board did not hold any hearings at which findings were made to justify exclusion

[19]The Court of Appeals also cites *Fascination, Inc. v. Hoover* (1952), 39 Cal. 2d 260, 246 P. 2d 656 where the court ordered a business license issued to plaintiff by certain city officials. The California Supreme Court held that while the administrative agencies involved had acted erroneously in proceeding without a required hearing, since the matter was one entrusted to administrative decision the court should have remanded the matter to the agency for further and proper proceedings rather than finally disposing of it on its merits. In the present case, the District Court found that the Bank Board had not merely proceeded in an irregular fashion in dealing with a matter committed to its discretion, but *had acted beyond its authority* insofar as the exclusionary clauses were concerned. Moreover, the Court of Appeals did not direct a remand to the Bank Board but ordered the actions dismissed.

of certain of the shareholder members of Long Beach.

3. No plenary trial has been held in the District Court to test the Board's action, while the Court of Appeals itself assumes for purposes of its decision that the exclusionary clauses were invalid.

In short, a large group of shareholder depositors have been deprived of valuable property interests without any opportunity for either an administrative or court hearing.

Such deprivation is particularly unjust in the case of Intervenor Ross, who intervened in these proceedings some four years ago for the very purpose of insuring that he would not be subjected to the forfeiture which the Bank Board sought to impose until he had had his day in court, including an opportunity to present the facts and circumstances which rendered the Bank Board's action arbitrary and oppressive as to him. He has never had an opportunity to make that presentation. Under the Court of Appeals' opinion he will be forever barred from doing so while suffering what is tantamount to forfeiture of his pro rata share of Equitable stock.

The Court of Appeals seeks to explain this manifestly unjust result on the ground that the excluded shareholder members should have sought to enjoin the entire merger and are therefore barred by laches.[20]

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[20]Even assuming—which we do not concede—that the laches question might otherwise be dispositive of the case, the excluded shareholders have *never been afforded an opportunity for a plenary trial on this issue*, the Court of Appeals having sustained this defense (contrary to the trial court's judgment) as a matter of law.

Yet, as noted above, a pre-merger attack would not have afforded a practical alternative.[21]

Moreover, by the express terms of the Merger Agreement, the excluded shareholder members were led to believe that their right to challenge the exclusionary clauses would be preserved. Thus, the Merger Agreement recites:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long

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[21]The Court of Appeals notes (C.A. Op. p. 17, footnote 28):

> "Another possible remedy might have been the assertion of appraisal rights by aggrieved shareholders. Again, however, the complaints in the actions before us do not request such relief."

As noted in a Petition for Rehearing filed in the Court of Appeals (and conceded by the Bank Board at pages 6-7 of its Response to said Petition), the terms of the Merger Agreement expressly prohibit resort to the appraisal rights conferred by California Corporations Code, Sections 4300, *et seq.*, even assuming, *arguendo*, that the California appraisal statute might otherwise be applicable to a federal mutual savings association. Article VIII of the Merger Agreement contains the following provision:

> "3. Any dissenting shareholder of Long Beach and any dissenting stockholder of Equitable will have the rights provided in the Corporations Code of the State of California, Section 4300, et seq., which reads in part:
>
> '. . . The fair market value shall be determined as of the day before the vote of the shareholders approving the agreement of merger or consolidation, excluding any appreciation or depreciation in consequence of the proposed action'; *provided, however, Long Beach dissenting shareholders shall be limited to those having participation rights and then only to the extent of such rights.*" (Emphasis added). [Pltf. Ex. 12/9/63-10A, p. 48].

> Beach, or *any part thereof,* incorporated herein." (Emphasis added) [Pltf. Ex. 12/9/63-10A, p. 47].[22]

In effect the Court of Appeals reads into the above-quoted clause from the Merger Agreement the condition that such challenge must be made prior to the merger. Yet the clause itself contains no such limitation. Can it be doubted that any pre-merger challenge would have been met with the argument that it was premature in view of the express preservation of rights in the Merger Agreement?

That the shareholders acted promptly in seeking judicial relief once the merger was consummated cannot admit of doubt. As the Court of Appeals notes (C.A. Op. pp. 7-8): the merger was not consummated until September 10, 1963; two of the present lawsuits were instituted *that very day* and the third a week later.

Nor was the Bank Board, the Commissioner or anyone else misled in any respect. Certainly at the time the merger was consummated it was anticipated that a challenge would be made to the exclusionary clauses, which is precisely what occurred.

If anyone is to blame for the post-merger challenge (and we do not suggest anyone is), it is the Bank Board, which permitted the merger to go forward when it knew or should have known that a post-merger challenge was to be made.

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[22]The United States District Court found in its opinion (233 F. Supp. 578 at 596):

> "The Bank Board . . . agreed to the insertion of the provision that the validity of *any part* of the Agreement could be contested." (Emphasis by the Court).

Under such circumstances, it is strange to find the Court of Appeals condemning the excluded shareholders for "laches".

The net result—depriving the excluded shareholders of any opportunity for a hearing or redress—is hardly consistent with the demands of procedural due process as guaranteed by the Fifth Amendment.

Conclusion.

The present case presents important questions in the area of judicial review of administrative agencies. The opinion of the Court of Appeals, if permitted to stand, will preclude effective review of the actions of the Federal Home Loan Bank Board and, by analogy, of other agencies as well. Moreover, in holding that the shareholder depositors of Long Beach may be deprived of their pro rata share of assets without a judicial or administrative hearing, the court has reached a result at variance with the dictates of procedural due process.

In order that these unfortunate results may be corrected and appropriate criteria laid down to govern this important area of law, we respectfully request that the within Petition be granted.

Respectfully submitted,

HARVEY M. GROSSMAN,
Attorney for Petitioner,
N. Joseph Ross.

Of Counsel:

PACHT, ROSS, WARNE, BERNHARD
& SEARS

APPENDIX A.

Court of Appeals.

Opinions, Judgments and Order Denying Rehearing.

(Note: The Opinion of the District Court is reported at 233 F. Supp. 578 and annexed as Appendix I to the companion Petition for Certiorari being filed by Long Beach Federal Savings and Loan Association, et al.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation, and agency of the United States,
Appellants,

vs.

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, suing on behalf of all of the savings shareholders of said Association as a class; and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association,
Appellees.

No. 20,378

FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation; EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual association; JOHN DOES 1 through 70,000,
Appellants,

vs.

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, suing on behalf of all of the savings shareholders of said Association as a class,
Appellees.

No. 20,447

FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation and agency of the United States; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual association; JOSEPH FIELDS, a citizen of New York; MARION FIELDS, a citizen of New York; RALPH FIELDS, a citizen of New York; JOHN DOES 1 through 70,000,
Appellants,

vs.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation,
Appellee.

No. 20,522

[August 18, 1967]

Appeal from the United States District Court
for the Southern District of California,
Central Division

Before: BARNES, HAMLEY and DUNIWAY, Circuit Judges

HAMLEY, Circuit Judge:

Three appeals have been consolidated for disposition under the above caption. They bring into question summary judgments, entered in three cases involving the merger of Long Beach Federal Savings and Loan Association (Long Beach), and Equitable Savings and Loan Association (Equitable). The effect of each judgment is to declare invalid the formula set forth in the merger agreement governing the distribution of Equitable's guarantee stock to Long Beach shareholders, and to substitute another basis upon which such distribution would be made. The district court opinion is reported. *Elliott v. Federal Home Loan Bank Board*, D.C.S.D. Cal., 233 F.Supp. 578.

We first state the underlying facts substantially as set forth in the Board's brief on this appeal.

Long Beach was chartered as a Federal Mutual Savings and Loan Association on July 10, 1934, under the Federal Home Loan Bank Act, 47 Stat. 725 et seq. (1932), as amended 12 U.S.C. § 1421 et seq. (1964).[1] In 1946, and again in 1960, the Federal Home Loan Bank Board (Board) determined that Long Beach had engaged in certain unsound financial operations. Proceeding under sections 1 et seq. of the Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. § 1461 et seq. (1964), the Board took over the management of Long Beach on both occasions.[2]

On February 14, 1962, a settlement agreement was entered into by and among Long Beach, the Board, and Federal Savings

[1]The first charter was replaced by a second charter on July 10, 1937.

[2]These take-overs and related actions resulted in extensive federal litigation which has many times been before this court and the United States Supreme Court. See *Elliott v. Federal Home Loan Bank Board*, 233 F.Supp. 578, 584, n. 1, for a comprehensive list of previous court decisions. In addition to the three appeals dealt with in this opinion, nineteen other appeals and a writ proceeding related to this general controversy are now pending in this court, and still other proceedings are in progress in the district court.

and Loan Insurance Corporation (Insurance Corporation), providing for the dismissal of all then pending litigation between those parties, and for the return of Long Beach to its private management.

Under the terms of the settlement agreement, Long Beach was given the right, if it so chose, to liquidate pursuant to a specific plan set forth in Article XV of that agreement. This plan provided for the transfer of Long Beach savings accounts to Equitable, a California state guarantee stock company. Under the agreement Equitable would, in turn, assume the liability associated with these transferred accounts. In consideration of such assumption of liability, Long Beach would transfer to Equitable an equal amount of Long Beach assets. The remaining assets of Long Beach, after payment or provision for payment of creditor claims, would be distributed to Long Beach shareholders on a pro rata basis.

Pursuant to the settlement agreement, Long Beach was returned to its private management on April 2, 1962. At that time, savings (share) accounts in Long Beach aggregated about $30,500,000. On the day of the return, April 2, approximately $24,000,000 were deposited in Long Beach, and on succeeding days until November, 1962, there were substantial additional deposits.[3]

In the meantime, in May, 1962, Long Beach management had informally submitted to the Board a proposed plan of merger between Long Beach and Equitable. This merger plan differed in substantial respects from the liquidation plan set out in Article XV of the settlement agreement. Under the merger plan, all, and not part, of Long Beach's assets and liabilities were to be transferred to Equitable. Under the merger, Long Beach shareholders would then receive payment for the value of Long Beach as a going concern by way of distribution to them of Equitable guarantee stock, not from the proceeds of the liquidation of Long Beach assets as provided in Article XV of the settlement agreement.

Because of the substantial differences between the two plans, Long Beach sought Board approval of the merger agreement con-

[3]As of April 30, 1962, Long Beach savings accounts had climbed to about $65,800,000. From then until November 30, 1962, the net increase in savings accounts was approximately $5,700,000, bringing the total of all accounts to about $71,500,000 on that date.

taining the new distribution terms. The two parties carried on negotiations as to the proposed merger from May, 1962, to June, 1963. At the same time, Long Beach also sought the approval of the Savings and Loan Commissioner of the State of California (Commissioner).

In early July, 1962, while negotiations were proceeding in connection with the merger proposal, Thomas A. Gregory, president of, and principal negotiator for, Long Beach,[4] advised the Board that large withdrawals had been made from Long Beach after the payment of the June 30, 1962 dividend.

At the Board's request, Gregory submitted a list of accounts of $100,000 or over which had been opened at Long Beach on and after April 2, 1962, the date of Long Beach's return to private management. This list showed that seventy-seven such accounts, totalling in the aggregate about $20,500,000, had been opened, according to Gregory's characterization, by "celebrities of the financial and entertainment world widely known for their great wealth and business acumen."[5] There was also a dramatic increase in the number of large new accounts ranging from $20,000 to $100,000.[6] Approximately $10,000,000 of the $100,000 plus accounts were withdrawn after the June 30, 1962 dividend.

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[4]During this period of merger negotiations, Gregory was also the beneficial owner of a substantial block of Equitable stock. As late as June 20, 1963, his name was carried on Equitable's stationery as vice-president.

[5]This increase in the number of large deposits was a marked change from the situation that existed on April 22, 1960, when Long Beach was taken over by the Board. At that time Long Beach, with savings accounts of approximately $96,000,000, had only one account in excess of $100,000.

[6]In April, 1960, there was only one account in the $75,000 to $100,000 range. During the period between April 2, 1962, and November 30, 1962, there were six such accounts, none of the owners of which had previously been Long Beach shareholders. In April, 1960, there were no accounts in the range of $50,000 to $75,000. In the 1962 period referred to above, there were thirty-four such accounts, only two of which were owned by previous Long Beach shareholders. In April, 1960, there were thirty-three accounts on deposit in the range from $20,000 to $50,000. In the 1962 period, there were 124 such accounts, only eighteen of which were owned by previous Long Beach shareholders.

A later analysis of Long Beach accounts which *increased* by $10,000 or more between April 2 and November 30, 1963, revealed equally marked contrasts in the $20,000 to $100,000 range.

This influx of large accounts into Long Beach, most of which were opened by persons having no prior connection with Long Beach, was of grave concern to the Board. In the Board's view, disputed by Long Beach, the necessary net effect of this influx of new money, most of it borrowed for the purpose,[7] was to dilute the interests of the small and regular shareholders in the Long Beach net worth in the event of liquidation or merger.[8]

During the negotiations for approval of the merger plan, the Board took the position that, in permitting such a tremendous influx of new money of this sort, Long Beach management had breached its fiduciary duty by allowing these new large depositors to share in Long Beach's net worth.[9] The Board therefore indicated that it would not approve a pro rata distribution of Equitable stock to Long Beach shareholders. The Board reasoned that to allow the new large depositors to share in a pro rata distribution would have permitted these depositors to share in Long Beach's net worth to which, in the Board's view, they had contributed nothing.

Long Beach, on the other hand, took the position that there was no breach of fiduciary duty and that it needed all these deposits

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[7]Of the aggregate of more than $28,000,000 in accounts which had been increased by $10,000 or more between April 2, 1962, and November 30, 1962, over $12,000,000 of such accounts were pledged as of November 30, 1962, to secure loans. The proceeds of most of these loans had been deposited in Long Beach. The principal pledgee of these accounts was the City National Bank of Beverly Hills which, as of November 30, 1962, had outstanding loans of over $8,000,000, the proceeds of which had been deposited in Long Beach. Mr. Hart, the President of the City National Bank, was a substantial stockholder in Equitable, as was one of its other officers, Curtis Palmer.

[8]The Board also argued that, because of this sudden and large inflow, Long Beach was in no position to invest the new money quickly, yet had to pay a dividend to the new savers ranging from 4.5 percent to 4.8 percent. Consequently, Long Beach operated at a loss of over $100,000 per month during the period from January 1, 1963 to September 10, 1963, and this development in turn resulted in a substantial reduction in net worth.

[9]Under sections 6(e) and (f) of the Long Beach by-laws, management had the power to prevent such an influx by limiting share payments which could be accepted, or by rejecting any application for a share account.

to maintain a secure position.[10] Long Beach also held the view that while losses were necessarily sustained in holding such large sums under certificates of deposit while paying a dividend thereon, this was necessary to provide adequate liquid assets to accommodate any possible future run on Long Beach.[11] In addition, Long Beach asserted that the influx of new savings deposits actually conferred major benefits.[12]

As an outgrowth of these conflicting views, Long Beach and Equitable agreed to insert in the merger agreement the distribution provisions here in question. In effect, these distribution provisions, set forth in Articles VII and VIII of the merger agreement, denied participation rights in the distributable Equitable

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[10]In its proposed finding of fact No. 28, Long Beach stated:

"28. In March-April, 1962, Long Beach Federal's officers and its Shareholders' Protective Committee wished to rehabilitate the precarious financial condition of the seized Association. They felt substantial new savings deposits were urgently and immediately required for such rehabilitation. The first few days of the restored Association upon its return to its founding management were believed to be the most critical time."

[11]Long Beach had lost $10,000,000 of its savings deposits in a run of withdrawals, following the Board's 1946 seizure of Long Beach. It had similarly lost $69,000,000 in 1960, reducing Long Beach's then total of savings deposits from over $96,000,000 to about $28,000,000.

[12]As stated in its opening brief on these appeals, Long Beach believes that the deposit of these additional sums were beneficial in the following respects:

"(a) Equitable paid $3,000,000 in guarantee stock for the goodwill of the restored Association. Said goodwill resulted solely from the new $42,000,000 of savings deposits.

"(b) The additional $3,000,000 to be impounded for 10 years was released for immediate distribution among the Long Beach Federal depositors. Equitable's assumption of all Long Beach Federal liabilities, known as well as unknown, made this release possible.

"(c) Approximately $3,884,000 of possible income taxes were saved. The $42,000,000 in new savings deposits under 26 U.S.C. 593 created a tax shelter of 12% or about $5,000,000. This tax shelter enabled Long Beach Federal to received [sic] the $5,000,000 compensation paid it by appellants Bank Board and Insurance Corporation as damages, tax free. The $5,000,000 tax shelter also enabled Long Beach Federal to transfer its surplus to Equitable without taxes which might otherwise have wiped out the distribution." (Record references and footnotes omitted.)

In its reply brief the Board took issue with all of these assertions.

guarantee stock to the extent that new accounts, or additions to April 22, 1960 account balances, exceeded $10,000, and with respect to pledged accounts to the extent of the pledge.[13] In addition, these provisions restricted obvious "insiders" from participating in the distribution except to the extent of their April 22, 1960, account balances.

The merger agreement, with the restrictive distribution provisions included, was executed by Long Beach and Equitable on June 12, 1963. The Board conditionally approved it on June 14, 1963, the conditions being formal and technical. The Long Beach management shortly thereafter mailed a proxy statement, including copies of the merger agreement, to its members with its covering letter of June 17, 1963.

The Long Beach members approved the merger agreement overwhelmingly at their meeting on July 6, 1963. Ninety-six percent of all the votes cast for the merger at that meeting were cast by the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association (Committee).[14] Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon that portion of the new Article VII of the merger agreement which reads:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

The Equitable stockholders voted their approval on July 13, 1963. The Commissioner granted his approval on August 28, 1963. The Board's final approval was given on September 5, 1963. On September 10, 1963, the merger was consummated by filing the

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[13]April 22, 1960 is the date upon which Long Beach was seized for the second time by the Board. The $10,000 figure was selected because the Board believed that new accounts would generally not be opened by bona fide savers in amounts larger than the then maximum amount of $10,000 federal account insurance for any one account.

[14]This is a committee of Long Beach savings depositors formed in 1946. The Committee has, since then, continuously engaged in litigation concerning the affairs of Long Beach, particularly Long Beach's controversy with the Board.

merger agreement with the Secretary of State of the State of California.

Up to that time, no proceedings had been instituted to enjoin or otherwise test the validity of the merger agreement or any of its provisions. However, on September 10, 1963, the date upon which the merger agreement was consummated, two actions were commenced having this object in view. On September 17, 1963, a third action was filed having the same general objective. These are the three actions in which the summary judgments now under review were entered.[15]

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[15]The first of these actions (No. 63-1072 PH), described as one to quiet title and for declaratory relief, was brought in the United States District Court, Southern District of California, Central Division, (now Central District) by Long Beach and four individuals constituting the Committee, the latter suing as individuals, as the Committee and as representatives of the entire class of Long Beach shareholders.

The Insurance Corporation, organized pursuant to section 402 of the National Housing Act, 48 Stat. 1256 (1934), 12 U.S.C. § 1725 (1964), is an agency of the United States. Because of its identity of interest with that of the Board, we will not hereafter make separate reference to the Insurance Corporation.

The second action, which was also one to quiet title and obtain declaratory relief, was filed in the California Superior Court by the same individuals, suing in the same capacity as were plaintiffs in the district court action filed on the same day. The defendants in this action are the Board, Equitable, Long Beach and "John Does 1 through 70,000." On October 10, 1963, the Board removed this action to the district court, where it was docketed as No. 63-1230 PH.

The third action (No. 63-1107 PH) was filed in the district court by Equitable against the Committee, the Board, Long Beach and some individual Long Beach shareholders. This action was described as one in interpleader and for declaratory relief. At the time it commenced this action, Equitable deposited with the clerk of the district court the 791,650 shares of its guarantee stock which, under the terms of the merger agreement, it was contractually obligated to distribute to Long Beach shareholders.

During the course of the trial court proceedings, the Commissioner was added as a party defendant in Civil Actions Nos. 63-1107 PH and 63-1230 PH. Equitable was added as a party defendant in Civil Action No. 63-1072 PH. The Commissioner moved to dismiss the two actions in which he had been added as a party, challenging the district court's jurisdiction on the ground of sovereign immunity. The Board contended that the Commissioner was an indispensable party in all three actions and that if he was not subject to the jurisdiction of the district court, the actions must be dismissed. The trial court denied the two motions to dismiss filed by the Commissioner.

The basic issue in each of these cases is the validity of the restrictive distribution provisions of Articles VII and VIII of the merger agreement. Long Beach, the Committee, and Equitable took the position that the provisions were invalid. The Board and the Commissioner contended that they were valid.

On October 28, 1963, a stipulation was entered into by the parties and approved by the court authorizing distribution of 585,821 of the 791,650 shares of Equitable guarantee stock. This distribution was to be made to former Long Beach shareholders to the extent that their accounts were unaffected by the restrictive distribution provisions of the merger agreement. The district court order effectuating the terms of the stipulation became effective on December 10, 1963. The ownership of 205,829 shares of Equitable stock remained in dispute.

Further pleadings were filed in the three cases and some discovery was had. Several joint pre-trial hearings were conducted and an order was entered consolidating the three cases for pre-trial and trial purposes. The parties then complied with the court's direction to file cross-motions for summary judgment.

The Committee, Long Beach and Equitable joined in a motion for a summary judgment declaring invalid the restrictive distribution provisions of Articles VII and VIII of the merger agreement, and requiring the distribution of Equitable's guarantee stock to be on a pro rata basis. The Board and the Commissioner moved for summary judgments dismissing the actions.

Pursuant to its memorandum opinion, findings of fact and conclusions of law, the district court entered summary judgments for the Committee, Long Beach and Equitable. 233 F.Supp. 578. The principal effects of the judgments are to declare invalid the restrictive distribution provisions contained in Articles VII and VIII of the merger agreement, and to require a pro rata distribution of Equitable guarantee stock to all eligible holders of Long Beach share accounts.[16]

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[16]By "pro rata" distribution, the court meant that each "eligible holder of share accounts" of Long Beach is the owner of that number of the 791,650 shares of Equitable guarantee stock which is pro rata in proportion that the "eligible balance" of each eligible holder of share accounts, respectively, bore to the aggregate total of all eligible share accounts in Long Beach immediately prior to the consummation of the

The Board and the Commissioner have appealed.[17] They advance a number of arguments for reversal. We will consider first their argument that the district court was without power to change the terms of the merger plan by setting aside the restrictive distribution provisions contained in Articles VII and VIII of the merger agreement and substituting the pro rata distribution provisions set forth in the judgments.

The restrictive distribution provisions, set out in Articles VII and VIII of the merger agreement, had been approved by the Board and by the Commissioner. The district court determined that these distribution provisions were invalid. However, it did not set aside the merger.[18] Instead, the court formulated and compelled application of new merger provisions calling for a pro rata distribution of Equitable's guarantee stock. These new provisions have never been approved by the Board or the Commissioner. The Board and Commissioner contend that the district court was without power to make and enforce these changes in the merger agreement which had not been approved by the Board and Commissioner.

With reference to the need for obtaining Board approval of the merger agreement, section 5(d) of the Home Owner's Loan Act of 1933, 48 Stat. 133, 12 U.S.C. § 1464(d)(2) (1964), provides in part that the Board shall have the power to make rules and regulations ". . . for the reorganization, merger, and liquidation of

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merger agreement at 8:30 a.m. on September 10, 1963, less costs and attorneys' fees which might be thereafter allowed.

The judgments provide that the words "eligible holder of share accounts" mean a depositor having an account or accounts and holding a regularly issued pass book immediately prior to 8:30 a.m. on September 10, 1963. The judgments also provide, with an exception not here relevant, that the words "eligible balance" mean the amount of each such share-account of each eligible holder of share account or accounts, as of the close of business on November 30, 1962, less withdrawals from such account or accounts after November 30, 1962, and immediately prior to 8:30 a.m. on September 10, 1963, the last-in first-out rule being applied to such withdrawals.

[17]This court granted a stay of compliance with the district court's judgment pending disposition of the appeal.

[18]We will discuss below the question of whether, under the circumstances which confronted the court, it could have set aside the merger.

Federal associations. . . ."[19] Regulations governing the merger, dissolution, reorganization, and conversion of Federal associations are set out in 12 C.F.R. § 546 (Rev. as of January 1, 1963). Although one paragraph of that section (546.2) deals with the merger of two or more associations, and provides that such a merger shall not be effective unless and until approved by the Board, that particular paragraph does not apply where, as here, a state-chartered institution is to be the resulting association.

However, another paragraph of that section (546.4), dealing with the voluntary dissolution of federal associations, also requires prior approval by the Board. Although the transaction in question is not solely a voluntary dissolution of Long Beach, it does contemplate Long Beach's ultimate and voluntary dissolution. The Board and Long Beach, apparently regarding section 546.4 as the most nearly applicable Board regulation, employed that section as the regulatory channel through which the merger should be processed.

Thus Long Beach, on June 11, 1962, submitted to the Board an application for "dissolution by merger" with Equitable ". . . in accordance with Section 546.4 of the Rules and Regulations. . . ." Pursuant to the same regulation, the Board granted its approval after certain changes were made in the merger agreement, including the insertion of the restrictive distribution provisions embodied in Articles VII and VIII of the merger agreement. Neither in the administrative proceedings nor in the district court proceedings, did any party contend that 12 C.F.R. § 546.4, with its Board approval requirement, was inapplicable to this transaction.

It would therefore appear that, under section 5 (d) of the Home Owner's Loan Act of 1933, and 12 C.F.R. § 546.4, no merger between Long Beach and Equitable, contemplating the survival of Equitable, could be effectuated except under terms and conditions approved by the Board.

The district court held, however, that despite this statute and regulation, Board approval was not required. The court so ruled

[19]Under section 2(d) of that act, 12 U.S.C. § 1462(d) (1964), the term "association" is defined as a Federal Savings and Loan Association chartered by the Board as provided in section 5 of the act, 12 U.S.C. § 1464.

on the ground that the transaction was actually consummated under the second unnumbered paragraph of section 5(i) of the Home Owner's Loan Act of 1933, 12 U.S.C. § 1464(i), which section does not require Board approval. See 233 F.Supp. at 592.

The court reached this conclusion after analyzing the second and third unnumbered paragraphs of section 5(i) of the Act. The second unnumbered paragraph, which does *not* require Board approval, provides for conversion of a federal savings and loan association to a state savings and loan association upon the vote of not less than fifty-one percent of the shareholders voting at a meeting specially called for that purpose, provided certain conditions set forth in that paragraph of that statute have been fulfilled. On the other hand the third unnumbered paragraph of section 5(i), which *does* require Board approval, does not require approval by vote of the shareholders.

The district court reasoned that since the Board required approval of a majority of the shareholders at a meeting specially called for that purpose, the Board must have been proceeding under the second unnumbered paragraph of section 5(i), which does not require approval by the Board. However, an even more logical conclusion would be that the Board was proceeding under 12 C.F.R. § 564.4, which states in part:

> "When a plan of dissolution has been approved by the board of directors of a Federal association and by the Board, such plan shall be submitted to the members of such association at a duly called meeting and, when *approved by a majority* of the votes cast at such meeting, shall become effective." (Emphasis added.)

In full compliance with section 546.4, after the Board had conditionally approved the merger agreement on June 14, 1963, it was submitted to the Long Beach members who approved the agreement by a majority vote at their July 6, 1963 meeting.

During the administrative and district court proceedings, none of the parties contended that the second unnumbered paragraph of section 5(i) was applicable to this merger transaction. That paragraph of section 5(i) deals not with the kind of transaction before this court, the merger of a federal savings and loan association with a state savings and loan association, but with the

change of status of a federal savings and loan association to a state savings and loan association. The merger transaction involves two entities while a conversion transaction involves only one entity.

Moreover, the second unnumbered paragraph of section 5(i), which does not require Board approval, relates to a conversion from a federal mutual association to a state *mutual* association.[20] As the Board correctly points out, even if a conversion of a single entity from one form to another were stretched to include the merger of two entities, the "conversion" which took place here was not from a federal mutual to a state mutual, but from a federal mutual to a state *stock* association, the latter (Equitable) being the resulting or surviving institution.

We conclude that the second unnumbered paragraph of section 5(i) has no application to this transaction and therefore does not relieve the merging associations from the necessity of obtaining Board approval under the regulations referred to above.

With reference to the necessity of obtaining the approval of the Commissioner before a merger of a California state savings and loan association and a federal savings and loan association may be effectuated, sections 9203 to 9205 of the California Financial Code are controlling. Sections 9203 and 9204 authorize such mergers and specify conditions which must be met. Section 9205 expressly requires that any such merger must be approved by the Commissioner.

During the state and federal administrative proceedings, no one questioned the applicability of these state statutes, and Long Beach sought and obtained the Commissioner's approval of the merger agreement. Neither the district court, in its opinion, nor appellees, in this court, have questioned the applicability of these state statutes to merger transactions of the kind involved in this case.

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[20]This is made clear by the sixth proviso of the second unnumbered paragraph of section 5(i), which reads:

> ". . . (6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits; . . ."

However, with regard to both the federal and the state requirements for obtaining administrative approval, the district court concluded that the Board and Commissioner should be deemed to have agreed to submit the disputed validity of the contested provisions to a "court of competent jurisdiction."[21] Observing that this was a court of competent jurisdiction, the district court held that it had jurisdiction of the subject matter and the parties ". . . and there is nothing further the Bank Board can do even if the matter were remanded." Therefore, upon holding that the disputed provisions in the merger agreement were void, the court reasoned, in effect, that it was empowered to formulate and enforce new pro rata distribution terms as a part of the merger plan, without any approval by the Board or Commissioner.

One of the reasons given by the district court for disposing of the case in this manner is based upon the following provision in the approved merger agreement:

> "This agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

In our opinion, the Board's approval of the merger agreement, with the inclusion therein of the provision preserving the right to litigate the merits or validity of the merger agreement or any part thereof, did not and could not, dispense with the necessity of obtaining approval of the Board and the Commissioner. Since the Board and the Commissioner are not parties to the merger agreement, the provision in question has no force as a contractual undertaking to abstain from performing their duties to approve

[21] The district court pointed out that, in advance of the Board's approval of the merger agreement, the Board was notified that Long Beach and the Committee were going to contest the validity of the distribution terms of the merger agreement, and that Equitable would probably file a suit in interpleader. The district court further observed that, with this knowledge, the Board nevertheless approved the merger agreement. The court added that in reliance upon this provision of the merger agreement permitting legal testing of any part of it, the parties proceeded to and did complete the merger, and immediately thereafter filed the suits now before us.

or disapprove. Their approval of the provision does not represent a voluntary abandonment of the Board's and Commissioner's responsibilities in this regard, because the provision purports to do no more than restate the existing legal right of shareholders to test, judicially, the merits and validity of a merger plan.[22] Moreover, neither the Board nor the Commissioner has the power to contract away, voluntarily abandon, or delegate to the courts, their responsibilities fixed by statute and regulation, to approve or disapprove merger plans.[23]

The district court did not explicitly state in its opinion that provisions of the settlement agreement, which preceded the merger agreement, constituted Board approval of the pro rata distribution provisions required by the court. However, the district court did note that the Board had previously approved the pro rata provitions of the settlement agreement. Long Beach argues, in effect, that the Board's approval of the pro rata provision of the settlement agreement constituted implied approval of the pro rata distribution provision required by the trial court.[24]

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[22]The provision did serve the purpose of assuring shareholders that, by voting for the merger, or abstaining, they had not waived their right to engage in such litigation.

[23]Prior to its conditional approval of the merger agreement on June 14, 1963, it was made clear to Long Beach that the Board did not regard that agreement as accomplishing a surrender of the Board's approval or disapproval function. This is evidenced by a Board letter, dated May 30, 1963, in which Gregory, President of Long Beach, was told:

> "For your information, it is the Board's position that, insofar as it is concerned, no Long Beach shareholder who abstains from voting on the plan at the meeting of Long Beach members will be prejudiced in any way by such abstention in the event action should be instituted against the Board, et al. attacking the validity or merits of the plan, in whole or in part. *The Board will otherwise employ every legal defense available to it to defend the plan's validity and its merits.* The Board believes that, since the plan will have been proposed by the management of Long Beach and approved by Long Beach members, Long Beach Federal will necessarily either have to defend the plan or take a neutral position. To do otherwise would be inconsistent with the action of its management and with the vote of its members approving the plan." (Emphasis supplied.)

[24]The settlement agreement did not involve the Commissioner, so nothing provided therein could possibly constitute the Commissioner's approval of anything.

It is true that Article XV of the settlement agreement evidenced the Board's approval of the liquidation plan set out therein, a plan which did provide for a pro rata distribution. However, under Article XV there was to be a pro rata *cash* distribution of Long Beach's surplus, not a pro rata distribution of Equitable's guarantee *stock*, as required under the subsequently-formulated merger agreement. At an earlier point in this opinion we have noted the substantial differences between the liquidation plan of Article XV of the settlement agreement and the dissolution plan of the merger agreement.[25]

Long Beach was not contractually bound to follow the liquidation plan of the settlement agreement, and it apparently had good reasons for not doing so. But when it decided to proceed by way of merger and dissolution, utilizing distribution and other terms substantially different from those of the Article XV plan, it was then required to once more seek approval of the Board and the Commissioner. Long Beach understood this and, as noted above, did seek and acquire the necessary approvals of the merger plan.[26]

Circumstances which developed after the Board approved the settlement agreement, particularly those having to do with the

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[25]In a letter from the Board to Gregory, President of Long Beach, dated January 17, 1963, the Board made it quite clear that ". . . Article XV of the Settlement Agreement was not applicable to that plan of dissolution of Long Beach by way of merger with Equitable and that Board approval was necessary before such plan could be submitted to the shareholders for their approval."

[26]The last paragraph of Article XVII of the *merger* agreement evidences Long Beach's recognition that the merger agreement was not an implementation of the Article XV liquidation plan of the *settlement* agreement, but was an alternative to it. Article XVII of the merger agreement reads in part:

> "Each Association does hereby reserve, pending consummation hereof, all rights and agreements between the parties pertaining to carrying out the purposes and intent of Article XV of that certain Settlement Agreement made between the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation and Long Beach Federal Savings and Loan Association dated February 14, 1962, and each Association specifically agrees that in the event, for any reason, the within Merger Agreement not be consummated, that each Association shall be bound by the agreements between the Associations pertaining to said Article XV and shall exert every effort to consummate the same."

influx of large accounts into Long Beach, led the Board to conclude that a pro rata distribution arrangement would no longer be fair and equitable. Consequently, the Board required that the more restrictive distribution plan of Articles VII and VIII of the merger agreement be substituted for the pro rata arrangement.

Under all of the circumstances related above, the Article XV distribution plan of the settlement agreement does not, either in fact or in law, represent Board approval of the court-required pro rata distribution plan.

We do not question the power of a district court, in appropriate circumstances, to determine the legality of provisions of a particular merger-distribution plan. We hold, however, that under the circumstances of this case the district court was without power to remedy what it regarded as invalid distribution provisions of an administratively approved merger-dissolution plan, by designating a revised distribution plan, without the administrative approval required by state and federal statutes and regulations, which plan it thereafter compelled the parties to follow.[27]

The problem then arises as to what remedy was available, assuming that the district court was correct in determining that the restrictive distribution provisions of the approved merger agreement were invalid. The Board contends that, under the circumstances of this case, no remedy was available.

Among the various kinds of relief which might have been requested by plaintiffs, was an injunction to prevent the consummation of the merger on September 10, 1963.[28] However, suits were not filed until immediately after consummation of the merger.

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[27]See *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767; *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88; *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 268, 246 P.2d 656, 661.

[28]Under some circumstances, shareholders aggrieved by a merger plan containing improper distribution provisions, might have a claim for damages for conversion against the surviving corporation. However, no such claims were asserted or litigated in the suits now before us.

Another possible remedy might have been the assertion of appraisal rights by aggrieved shareholders. Again, however, the complaints in the actions before us do not request such relief.

This relief was therefore not then available. It need only be added that Long Beach and the Committee did not seek injunctive relief of this character.

The Board seems willing to concede that a request to set aside the merger can be read into the general prayer for appropriate relief in the complaints. The Board argues, however, that relief of this kind is in any event not available because it is barred by laches. We question whether plaintiffs sought any such relief, but in any event we agree with the Board that such relief is barred by laches.

The doctrine of laches, in the area of corporate stockholders' remedies, is stated as follows in 13 Fletcher Cyclopedia Corporations (Perm. Ed.) § 5874, page 279:

> "If a stockholder, with knowledge of wrongful acts on the part of the directors or a majority of the stockholders, stands by for an unreasonable time without taking any steps to set the acts aside or otherwise interfere, and rights are acquired by others, his right to sue is barred by his laches, however clear his right to relief would have been if he had moved promptly."[29]

As indicated by this statement of the doctrine, three elements must be present for the defense of laches to apply: (1) full knowledge of the facts, (2) unreasonable delay in the assertion

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[29]See, also, 70 A.L.R. 53, annotation; *Mardel Securities, Inc. v. Alexandria Gazette Corporation,* 4 Cir., 320 F.2d 890, 896; *Narragansett Electric Lighting Co. v. Sabre,* 51 R.I. 37, 150 A. 756, 759. Laches is a defense to the action of a minority stockholder or shareholder to set aside corporate acts whether fraudulent or ultra vires. *Baker v. Spokane Sav. Bank,* 9 Cir., 71 F.2d 487, 492.

Although the Committee purports to represent a majority of the shareholders of Long Beach, the position which the Committee takes in this litigation is obviously adverse to the interest of all of the shareholders, comprising an overwhelming majority, who stand to gain by the restrictive distribution provisions of the merger agreement, and stand to lose by the pro rata distribution provisions of the judgments under review. In this litigation, then, the Committee (and Long Beach, since it joins in the Committee's position) actually occupy the status, or represent the interests, of minority shareholders challenging the terms of the approved merger agreement.

of an available remedy, and (3) intervening prejudice to another. All three of these elements are present with respect to any effort in these suits to set aside the merger of Long Beach and Equitable.

All Long Beach shareholders, the members of plaintiff Committee, and Long Beach, were on notice of all material facts with respect to the proposed merger after the mailing of the proxy statement in mid-June, 1963. A copy of the merger agreement, executed by Long Beach and Equitable on June 12, 1963, was attached to that proxy statement. It follows that these shareholders, the Committee and Long Beach had from at least the middle of June, 1963, until September 10, 1963, when the merger was consummated, within which to institute litigation seeking to enjoin the merger and dissolution. Instead, they deliberately chose to wait until the merger had been effectuated, before commencing court proceedings testing the validity of the merger plan.

The result was that, before the actions were filed, substantial rights had attached growing out of the effectuation of the merger, which rights would necessarily have been prejudiced if, as an outgrowth of the three court actions, the merger were to be set aside. Principal among these were the rights of the shareholders of Long Beach and Equitable, as of the day of the filing of the merger, to enjoy the benefits of the merger.

These shareholders had not surrendered or prejudiced these rights in advance by voting for a merger agreement containing the provision permitting a court test of the distribution provisions. They were agreeing only to such litigation, necessary to test the validity of those provisions, as could be accomplished without setting aside a merger once effectuated. Everyone concerned knew, at the time the merger agreement was approved, that there was time to commence such a suit before completion of the merger, thus making it possible to postpone the merger, voluntarily or by injunction, until the court test could be resolved.

In addition to prejudicing these rights of Long Beach and Equitable shareholders, who were such on the date of the merger, a setting aside of the merger would also prejudice the rights of Equitable shareholders who became such after the merger. Moreover, the practical difficulty, if not impossibility, of unscrambling and returning the intermingled assets of the merged Long Beach

and Equitable associations, would be seriously prejudicial to Equitable.[30]

The only other relief which is arguably available as an outgrowth of these actions is a judicial determination that the distribution provisions of the merger agreement are invalid. This, in turn, would call for the formulation of new distribution provisions, such as the pro rata arrangement, approved by the court with or without the approval of the Board and the Commissioner. It might be urged that, following this course of action, the revised distribution provisions could be made a part of the existing merger plan without setting aside the merger.

However, we have already stated why the district court is without power to formulate and enforce a new distribution plan free and clear of Board and Commissioner approval. And a remand to the Board and Commissioner for the formulation or approval of a new plan is inappropriate absent power in those agencies to approve or disapprove, as a whole, what would then become a revised merger plan. Stated differently, the Board and the Commissioner have no authority to review and consider provisions of a merger plan except in performance of their function to approve or disapprove the merger plan as a whole. The latter power no longer exists because the merger is in effect and laches bars plaintiffs from setting the entire merger aside.

There is still another obstacle to any court relief involving substitution of new distribution provisions for those presently set forth in the merger agreement without upsetting the merger. A merger must be the product of an agreement approved by the affected shareholders. The shareholders of Long Beach and Equitable have not approved of a merger agreement containing distribution provisions different from those in the agreement under which the merger was effectuated. Their approval of a revised merger agreement would therefore be necessary.

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[30]Equitable, which was an interpleader in the district court, represents to us that it would be "impossible" to now divest Equitable of the Long Beach assets and liabilities. Nearly four years have passed since the merger went into effect on September 10, 1963. Equitable urges that, after the passage of this much time, the present Equitable assets and liabilities cannot be divided into a "Long Beach bundle" and an "Equitable bundle."

Several difficulties would be encountered in seeking shareholder approval of a revised merger agreement at this late date. Without doubt, many individuals who were shareholders of Long Beach and Equitable when the vote was taken on the original merger plan, are no longer shareholders of Equitable, the surviving association. Likewise, in all probability, Equitable now has many shareholders who were not shareholders of Long Beach or Equitable when the original merger vote was taken. Moreover, all shareholders who would now be called upon to vote on a revised merger plan would be confronted by a coercive factor which was not present when they voted on the original merger proposal, namely, that the merger had been consummated. In addition, should the outcome of a new vote indicate disapproval, further turmoil, uncertainty and delay would be interjected.[31]

Thus we conclude that laches is a bar to these suits, whether the relief sought would or would not require a setting aside of the merger. In summary, by deliberately waiting with their law suits until after the merger had been consummated, the Committee and Long Beach sought to confront the court with an accomplished fact which would enable them to test the validity of the distribution provisions without interfering with the consummation of the merger. But the entanglements described above require us to characterize this studied delay as laches, barring any relief which might otherwise have been available.

For the reasons stated above, and without reaching the several other complex questions raised on these appeals, the judgments are reversed, and the causes are remanded with directions to dismiss the actions and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

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[31]Having in view the extensive prior history of this controversy and the pendency of further litigation in this court and the district court (see note 2, above), it is easy to foresee the possibility that, unless soon brought to rest, this litigation could swallow up a substantial part of the excess Long Beach assets the parties are fighting about, and at the same time seriously cripple Equitable, as the surviving association.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-22-67—255

Judgment No. 20378.

United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Sidney Elliot, et al, Appellees.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

Judgment No. 20447.

United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Sidney Elliott, et al Appellees.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

Judgment No. 20522.

United States Court of Appeals for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Equitable Savings and Loan Association, a California Corp., Appellee.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al., Appellants, v. Sidney Elliott, et al., as the Shareholders Protective Committee of Long Beach Federal Savings and Loan Association and Long Beach Federal Savings and Loan Association, et al., Appellees. Nos. 20378, 20447, 20522.

Before: BARNES, HAMLEY and DUNIWAY, Circuit Judges.

Filed Jan. 12, 1968.

The motion of Long Beach Federal Savings and Loan Association and Elliott, et al., for permission to file a combined appellees' "Petition for Rehearing or Clarification and Suggestion for Hearing en Banc" exceeding five pages, filed September 14, 1967, and the motion of the same appellees for permission to file reply to appellants' response to petition for rehearing, filed December 29, 1967, are granted.

The "Petition for Rehearing or Clarification and Suggestion for Rehearing en Banc" is denied.

/s/ Frederick G. Hamley
/s/ Ben C. Duniway
United States Circuit Judges

SUPREME COURT, U.S.
FILED
MAR 14 1968
CLERK

IN THE

Supreme Court of the United States

October Term, 1967
Nos. 1118 and 1119

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

Respondents.

REPLY TO PETITIONS FOR CERTIORARI.

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IN THE

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SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

Respondents.

REPLY TO PETITIONS FOR CERTIORARI.

Respondent Savings and Loan Commissioner of the State of California (hereinafter referred to as Respondent Commissioner) offers the following considerations in response to Petitioner's Long Beach Federal Savings and Loan Association[1] and Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association[1] (No. 1118 before this Honorable Court) and N. Joseph Ross[1] (No. 1119 before this Honorable Court) Petitions for Writ of Certiorari:

[1]Parties petitioner as a group will be referred to herein as "Petitioners" and individually as Petitioner "Long Beach Federal," "Committee" and "Ross" respectively.

390 US 1011 U.S. Sup. Ct. Records, Briefs 1967, CD
Elliott v. Federal Home Loan Bank Board No. 1118*

Statement of Facts.

Respondent Commissioner adopts the Statement of Facts set forth in the Reply to Petition for Certiorari filed on behalf of Respondents Federal Home Loan Bank Board[2] and Federal Savings and Loan Insurance Corporation.[2]

It will be noted that Respondent Commissioner is a party only to two of the three cases involved in the Petitions for Certiorari here under consideration.[3]

Respondent Commissioner adds to said adopted statement the comments which follow *and* which apply specifically to allegations in Petitioners' pleadings which are of particular concern to Respondent Commissioner.

The Statement of the Case presented by Petitioner Ross states at page 8 that Respondent Commissioner moved for summary judgment in the United States District Court on the ground that the challenge to the exclusionary clauses should be rejected as a matter of law and the actions dismissed. Respondent Commissioner also relied on the ground that the United States District Court lacked jurisdiction over the person of the Commissioner and the subject matter of the action as to said Commissioner by virtue of the Eleventh Amendment, United States Constitution. (3R-1240-1262.)

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[2]Respondent Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation will be referred to individually as Respondent "Bank Board" and "Insurance Corporation" respectively.

[3]Respondent Commissioner is not a party to that case denominated in the Court of Appeals as 20378 (D.C. No. 63-1072-PH). For uniformity of record reference with other parties filing pleadings herein Respondent Commissioner will refer to the original papers in Court of Appeals Case No 20447 (D.C. No. 63-1230-PH) and Court of Appeals Case No. 20522 (D.C. No. 63-1107-PH), the two cases in which Respondent Commissioner is a party, as "2R" and "3R" respectively.

Petitioner's Long Beach Federal and Committee in their Statement commencing at page 7 of their Petition standardly make reference to Respondents Bank Board, *et al.* without differentiation between and among the various respondents. Such scattergun reference leads to glaring errors and misleading allegations in their Statement.

At page 7 these petitioners report that these respondents agreed to consent judgments for the distribution of about $7,000,000 in the form of Equitable Savings and Loan Association stock, to the savers in Long Beach Federal. The referred to distribution took place in December 1963. The Respondent Commissioner was not made a party until January 28, 1964. (3R-425a-425b.)

At page 15 these petitioners refer to the seizure of Long Beach Federal in 1960 by Respondent Bank Board, *et al.* The court may take judicial notice of the fact that Respondent Commissioner, a state officer, has no powers of seizure over federal associations, and that at the time of the seizure Long Beach Federal was a federal association.

Similarly, the report of payment of damages by respondents to Long Beach Federal, the Settlement Agreement with Long Beach Federal and the efforts to attract savings after the association was returned to private management (Petition of Long Beach Federal and Committee, pp. 16-17) relate to matters in which Respondent Commissioner was not a party.

Petitioners' Alleged Reasons for Granting the Writ.

A. Respondent Commissioner Adopts Brief of Respondent Bank Board and Insurance Corporation.

Respondent adopts as his own the Argument and Conclusion of Respondents Bank Board and Insurance Corporation set forth in the Brief in opposition to Petitions for Writs of Certiorari filed on their behalf in response to Petitioners' various petitions for certiorari.

B. Respondent Commissioner Is Not Subject to Federal Jurisdiction With Respect to His Actions in Connection With the Merger.

At the United States District Court level Respondent Commissioner moved for summary judgment on the ground, among others, that the court lacked jurisdiction over Respondent Commissioner. This issue was resolved against Respondent Commissioner at the trial court level.

At the Court of Appeals level Respondent Commissioner again urged that the United States District Court lacked jurisdiction over Respondent Commissioner because of the Eleventh Amendment to the United States Constitution and because of lack of consent by the Commissioner to suit in the federal courts. The Court of Appeals decision, rightly relying on the laches of petitioners here to dismiss their actions, had no need to reach the issue of jurisdiction.

Respondent Commissioner once more respectfully urges that he is not subject to federal jurisdiction with respect to his actions in connection with this merger.

The basic dispute in this litigation revolved around the formula for distribution of guarantee stock in Equitable Savings and Loan Association to former shareholders of Long Beach Federal. The merger agreement, to which Respondent Commissioner was not a party, contained the disputed formula. Respondent Commissioner acted pursuant to California Financial Code Sections 9203-9205 (see Appendix A) in approving the merger. Respondent Commissioner acted pursuant to California Financial Code section 6450 (see Appendix A) in issuing the stock permit. The permit set forth verbatim the formula (Paragraphs VII and VIII of the Merger Agreement) which gave rise to the dispute. The constitutionality of these state statutes has never been in issue, nor is there any question but what an adequate method of attack on an action of Respondent Commissioner is provided by California Code of Civil Procedure section 1085. (See Appendix A) implementing the authorization of judicial review provided for in California Financial Code section 5258 (see Appendix A).

Since no federal question re the statutes under which Respondent Commissioner acted ever existed in the basic lawsuits it is the position of Respondent Commissioner that the Eleventh Amendment to the United States Constitution prevents his being made a party to the action which led to the Petitions for Certiorari here under consideration.

The Eleventh Amendment of the United States Constitution reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law of equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

In *Osborn v. United States Bank,* 22 U.S. 326, 337 (1824), the court laid down the rule that a suit is not one against the state unless the state is a party to the record. This rule was repudiated by the court in *Governor of Georgia v. Madrazo,* 26 U.S. 84 (1828). It is now a well settled rule that in determining whether a suit is prosecuted against a state, the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit. *Ex parte Ayers,* 123 U.S. 443, 487 (1887), (8 Sup. Ct. 164).

The Eleventh Amendment, said the Court in *Ford Co. v. Dept. of Treasury,* 323 U.S. 459 (1945), (65 Sup. Ct. 347):

> "denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent" (p. 464).
>
> "* * * The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." (P. 467.)

The Eleventh Amendment also denies to the federal courts authority to entertain a suit against a State instituted by its own citizens (*Hans v. Louisiana,* 134 U.S. 1 [1890], [10 Sup. Ct. 504]).

The fact that the action arises under the Constitution and laws of the United States does not remove the prohibition (*Smith v. Reeves,* 178 U.S. 436, 447-448

(1900) [20 Sup. Ct. 919]). The court pointed out in *Missouri v. Fiske,* 290 U.S. 18, 26 (1933), 54 Sup. Ct. 18:

> "Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States."

The foregoing principles were recently reaffirmed in *Parden v. Terminal Railway,* 337 U.S. 184 (1964), 84A Sup. Ct. 1207, wherein the court stated:

> ". . . Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an *unconsenting State is immune from federal-court suits* brought by its own citizens as well as by citizens of another State. *Hans v. Louisiana,* 134 U.S. 1: *Duhne v. New Jersey,* 251 U.S. 311; *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 51; *Fitts v. McGhee,* 172 U.S. 516, 524. See also *Monaco v. Mississippi,* 292 U.S. 313. Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' *Hans v. Louisiana, supra,* 134 U.S., at 10; see *Duhne v. New Jersey, supra,* 251 U.S. 311; *Smith v. Reeves,* 178 U.S. 436, 447-449; *Ex parte New York,* 256 U.S. 490, 497-498. . . ." (Emphasis added.)

Ex parte Young, 209 U.S. 123 (1908), 28 Sup. Ct. 441, created an exception to the rule of state immunity from suit by permitting a suit against a state officer in his individual capacity in a federal court. The Supreme Court stated the rule in this fashion.

> "If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

Most of the cases involving the Eleventh Amendment are suits brought against state officials. Such suits "must depend upon the same principles that determine whether a particular suit is one against the United States." *Tindal v. Wesley,* 167 U.S. 204, 213 (1897), 17 Sup. Ct. 770.

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or *interfere with the public administration,*" (*Land v. Dollar,* 330 U.S. 731, 738 [1947], 67 Sup. Ct. 1009) or if the effect of the judgment would be "to restrain the government from acting or to compel it to act." *Larson v. Domestic Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949), 68 Sup. Ct. 1457.

The leading sovereign immunity case involving a federal official is the Supreme Court decision in *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949), 69 Sup. Ct. 1457. The court stated with reference to the doctrine of sovereign immunity:

> "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond

his authority and the action of the sovereign. *There is no warrant for such a contention in cases in which the decision . . . does not relate to the terms of his statutory authority.* Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams v. Nagle,* 303 U.S. 532, 542 (1938). We therefore reject the contention here. *We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign,* whether or not they are tortious under the general law, *if they would be regarded as the actions of a private principal under the normal rules of agency . . .*" (Emphasis added.)

The judgment in these cases, if as contended for by petitioner must either order Respondent Commissioner to act in a particular manner or in effect refrain from doing some act, else there is no reason for having Respondent Commissioner as a party. The decision would interfere with the public administration of a state agency, acting pursuant to state laws not here in question. It is submitted that this is a suit against a state in the federal courts within the meaning of the Eleventh Amendment to the United States Constitution, that consequently jurisdiction over Respondent Commissioner is absent, and that Respondent Commissioner should never have been retained as a party to this litigation.

Conclusion.

The petitions for writ of certiorari should be denied for the reasons set forth in the Respondents' Brief filed on behalf of the Bank Board and Insurance Corporation.

In the event that the Petition for Certiorari is granted, Respondent Commissioner should be dismissed from the action for lack of jurisdiction in the federal court system over him in this controversy.

Respectfully submitted,

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APPENDIX A.

Financial Code Sections.

§ 5258. Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2, and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. Except for review of proceedings conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, an action or proceeding for judicial review pursuant to this section must be commenced within 60 days after the issuance of such order, decision, approval, certificate, license or permit, or within 60 days after such denial, or other official act, or within 60 days after the effective date of this section whichever is the later date.

§ 6450. No association shall sell, except upon a sale for a delinquent assessment made in accordance with the provisions of this part or The General Corporation Law, or offer for sale, negotiate for the sale of, or take subscriptions for, or issue any of its stock, until the association applies for and secures from the commissioner a permit authorizing it to sell guarantee stock.

§ 9203. Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them.

§ 9204. Any domestic association may transfer its engagement funds, and property, in whole or in part, to a federal savings and loan association, or any federal savings and loan association may transfer its engagements, funds, and property, in whole or in part, to any domestic association, upon such terms as may be agreed by the affirmative vote of at least a majority of their respective directors, ratified, in the case of the contracting domestic associations by the vote or written consent of stockholders holding in the aggregate more than two-thirds of the outstanding stock and by the vote or written consent of shareholders holding in the aggregate more than two-thirds in value of the outstanding shares, and in the case of a contracting federal savings and loan association by the consent, in writing or by vote, prescribed by the laws of the United States and the regulations of the Federal Home Loan Bank Board applicable thereto.

§ 9205. Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, and with respect to any constituent domestic association he made in conformity with the provisions of law applicable to mergers, consolidations, and transfers in the case of corporations generally, and with respect to any constituent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations and transfers.

Code of Civil Procedure Section.

§ 1085. It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board of person.

SUPREME COURT, U. S.
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Nos. 1118, 1119

In the Supreme Court of the United States

OCTOBER TERM, 1967

SIDNEY ELLIOTT, ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

N. JOSEPH ROSS, PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD AND THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1118

SIDNEY ELLIOTT, ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

No. 1119

N. JOSEPH ROSS, PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD AND THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of California, Central Division (Elliott Pet. App. I),[1] is reported

[1] "Elliott Pet." and "Ross Pet." refer to the petitions in Nos. 1118 and 1119, respectively. "R." and "Exh." refer, respectively, to the certified transcript of the record and to the exhibits

at 233 F. Supp. 578. The opinion of the court of appeals (Ross Pet. App. A) is reported at 386 F. 2d 42.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1967. A timely petition for rehearing was denied on January 11, 1968. The petitions for writs of certiorari were filed on February 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court had acted beyond its powers in undertaking to revise the terms of distribution under a merger agreement between two savings and loan institutions where it appeared, *inter alia,* that the agreement had been approved by the voting members and stockholders of the merged organizations and by the appropriate State and federal administrative authorities.

2. Whether laches barred the relief which petitioners sought.

STATUTES AND REGULATION INVOLVED

Section 5(d)(2) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(2),[2] provides in pertinent part:

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which are being lodged with the Clerk of this Court. Briefs filed in the court of appeals, to which reference is made herein, are found in volume one of the certified transcript of the record.

[2] References are to the 1964 edition of the United States Code. The 1966 amendment to the Act (P.L. 89-695, 80 Stat. 1035) effected no substantial change in Section 5(d)(2).

> The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations * * *.

12 C.F.R. 546.4 and Section 9204 of the California Financial Code are reprinted in Appendix II to the petition in No. 1118 (Elliott Pet. App. II 8, 10). Section 9203 and 9205 of the California Financial Code provide as follows:

> § 9203. *Merger and consolidation of domestic and federal associations.* Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them.
>
> § 9205. *Approval of commissioner; compliance with federal law.* Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, and with respect to any constitutent domestic association be made in conformity with the provisions of law applicable to mergers, consolidations, and transfers in the case of corporations generally, and with respect to any constitutent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations, and transfers.

STATEMENT

On April 22, 1960, the Federal Home Loan Bank Board took over the management of Long Beach Federal Savings and Loan Association, a federal mutual savings and loan association, as the result of its determination that Long Beach had engaged in unsound financial operations. Resulting litigation between the Board and Long Beach was settled in February 1962 by an agreement which provided for the return of Long Beach to private management and which permitted Long Beach to elect to liquidate pursuant to a specified plan.[3] Long Beach was returned to private management on April 2, 1962, and in May of that year it abandoned its original liquidation plan and informally submitted to the Board a new plan for merging itself into Equitable Savings and Loan Association, a California-chartered, permanent stock association. Under the new proposal, all of Long Beach's assets and liabilities would be transferred to Equitable, and Long Beach's depositor-shareholders would receive Equitable guarantee stock, on a pro rata basis, in payment for the net worth of Long Beach (Ross Pet. App. A 2–4).

The Board found, however, that beginning on April 2, 1962, there had been a sudden influx of large accounts into Long Beach, most of which were opened

[3] The settlement agreement also compromised litigation resulting from a 1946 Board take-over of Long Beach management, which was also based upon a Board determination that Long Beach had engaged in unsound financial operations (Ross Pet. App. A 2–3).

with borrowed money by persons who had no prior connection with Long Beach. For example, 77 accounts of $100,000 or over, totalling about $20,500,000, were opened on and after April 2, 1962 (there had been only one such account in April 1960), and there also had been a "dramatic increase in the number of large new accounts ranging from $20,000 to $100,000" (Ross Pet. App. A 4–5 & nn. 5–7). The Board determined that in view of the proposed merger the Long Beach management breached its fiduciary duty by permitting this great influx of new money, which diluted the interests of the small and regular shareholders in Long Beach's net worth.[4] To prevent the speculating new depositors from siphoning off a substantial part of Long Beach's net worth, the Board refused to approve a merger plan providing for the pro rata distribution of Equitable stock (Ross Pet. App. A 5).

Following negotiations with the Board, Long Beach and Equitable revised the merger agreement to deny participation in the Equitable stock to the extent that a new account opened after April 22, 1960, or any

[4] Contrary to petitioners' assertions (Elliott Pet. 16–17), the Board's analysis showed that Long Beach was not in a precarious financial position in April 1962, and that its need was not for more deposits, but for more sound loans in which to invest its liquid resources. Long Beach was in no position to invest the sudden and large inflow of new money in sound loans, yet it had to pay a high dividend rate, ranging from 4.5 percent to 4.8 percent, to the new depositors. Consequently Long Beach operated at a substantial loss after April 2, 1962. The losses, which amounted to over $100,000 per month during January-September 1963, in turn resulted in a substantial reduction in Long Beach's net worth (Ross Pet. App. A 5 n. 8; 17 R. 1374–1379).

addition to an account balance made after that date, exceeded $10,000.[5] With respect to pledged accounts, participation was denied to the extent of the pledge. In addition, "insiders" (*e.g.*, officers, directors, and attorneys of Long Beach and Equitable) were precluded from participating in the distribution except to the extent of their April 22, 1960, account balances (Ross Pet. App. A 6–7; Exh. D, 47–48).[6]

The revised merger agreement was executed by Long Beach and Equitable in June 1963, and tentatively approved by the Board, subject to certain formal and technical conditions. The Long Beach depositors and the Equitable stockholders approved the merger agreement in July 1963. The California Savings and Loan Commissioner approved the merger in August, and the Board gave its final approval on September 5, 1963. The merger was consummated on

[5] The $10,000 figure was selected because it was then the maximum amount of federal account insurance, and the Board believed that generally new accounts would not be opened by bona fide savers in amounts larger than $10,000 in any one account (Ross Pet. App. A 7 n. 13). (The perecntage of accounts in all savings and loan associations with balances under $10,000 was 93.4 percent in 1964. *1965 Savings and Loan Fact Book of the United States Saving and Loan League*, p. 20.) April 22, 1960 was the date the Board took control of Long Beach.

[6] At the request of Long Beach and its "Shareholders' Protective Committee" a provision was also inserted into the merger agreement which restated the existing legal right of shareholders to test judicially the merits or validity of the merger plan or any part thereof (Ross Pet. App. A 7, 14–15; 16 R. 1203).

September 10, 1963, by filing the agreement with the California authorities (Ross Pet. App. A 7–8).

On the same day, immediately following the consummation of the merger, Long Beach and four Long Beach shareholders, suing individually and as the Long Beach "Shareholders' Protective Committee," commenced an action against the Board in the district court seeking a judicial determination that the Equitable guarantee stock should be distributed pro rata to all Long Beach shareholders without diminution of any shareholder's interest, notwithstanding the terms of the consummated merger agreement. A similar suit filed on that day in the California Superior Court was subsequently removed by the Board to the district court. On September 17, 1963, Equitable filed a third suit, in the nature of interpleader, in the district court and deposited the contested Equitable guarantee stock in court (Ross Pet. App. A 8 n. 15).[7]

Following consolidation of the three actions, the district court directed the parties to file cross-motions for summary judgment. It then declared the restrictive distribution provisions in the consummated merger agreement invalid and ordered a pro rata distribution of the Equitable stock to all Long Beach share-

[7] The Federal Savings and Loan Insurance Corporation, whose operations are directed by the Board, was also a defendant in the three actions. The California Savings and Loan Commissioner was subsequently added as a party defendant in the second two actions. Petitioner Ross, who with his wife opened accounts in Long Beach in April 1962 aggregating approximately $1 million (Exh. C–15; Exh. S), intervened as a party plaintiff in all three suits.

holders (Elliott Pet. App. I 578–600). The court of appeals unanimously reversed, holding (1) that the district court was without power to order the distribution of the stock on a basis which had not been approved by the federal and state regulatory agencies and (2) that laches barred the relief which petitioners sought (Ross Pet. App. A 17–21).

ARGUMENT

1. Contrary to petitioners' assertions, the court below did not hold that the Board's action was immune from judicial review. The court stated that it did "not question the power of a district court, in appropriate circumstances, to determine the legality of provisions of a particular merger-distribution plan" (Ross Pet. App. A 17).[8] The court recognized, however (*id.* at 10-11, 13), that under Section 5(d)(2) of the Home Owners' Loan Act and 12 C.F.R. 546.4, the merger of Long Beach into Equitable could not be effectuated except under terms and conditions ap-

[8] The suggestion in the Elliott petition (pp. 8, 27) that a congressional investigating committee has commented adversely on the restrictive distribution terms of the Long Beach merger agreement is unfounded. In 1963, the Board's Chairman, Mr. McMurray, explained to a congressional committee why the general rule of equal treatment of depositors in a mutual institution did not apply to the Long Beach distribution (see Exh. 22, 146–163). However, the 1960 committee report cited by petitioners (with which six committee members disagreed) dealt only with the question of the Board's take-over of the management of Long Beach—a matter which was resolved by the February 1962 settlement agreement. See H. Rep. No. 2083, 86th Cong., 2d Sess.

proved by the Board,[9] and that the California Financial Code expressly requires that any such merger must also be approved by the California Savings and Loan Commissioner. Relying on these statutory and regulatory requirements, the court of appeals correctly held that the district court lacked the power to designate a revised distribution plan without the administrative approval of the Board and the California Commissioner (Ross Pet. App. A 17).

In an apparent attempt to show that they were prejudiced by the consumated merger agreement, petitioners consistently refer to the distribution as "forfeitures," implying that the speculators would lose their investment.[10] The short of it is that the de-

[9] As the court of appeals noted (Ross Pet. App. A 11), although 12 C.F.R. 546.4 does not expressly cover the merger of a federal institution into a state-chartered institution, it was recognized by the Board and Long Beach as the most nearly applicable regulation, and employed as the regulatory channel through which the instant merger should be processed. In 1966, the Board promulgated regulations which explicitly deal with such mergers, and unmistakably require Board approval. 31 Fed. Reg. 15235 (December 6, 1966), corrected in 31 Fed. Reg. 15569 (December 10, 1966). The court of appeals also pointed out (Ross Pet. App. A 11–13) the infirmities in the district court's conclusion that a different result was required by Section 5(i) of the Act, 12 U.S.C. 1464(i) (Elliott Pet. App. II 4).

[10] Petitioners' assertion that "thousands" of small shareholders were adversely affected by the restrictive distribution formula is based upon misleading and erroneous data supplied by petitioners. See 17 R. 1344–1345, and page 4a of our reply brief in the court of appeals. See also the statistical data set forth at pages 54–55 of our main brief in the court of appeals. As the court of appeals observed (Ross Pet. App. A 18 n. 29):

"Although the ['Shareholders' Protective Committee'] pur-

positors who were adversely affected by the distribution provisions had the right to withdraw their deposits at any time; and they were entitled to, and did, receive interest on their funds. The only "forfeiture" was the loss of the windfall which eleventh-hour speculators expected to receive upon the distribution of the Equitable stock—representing Long Beach's net worth accumulated over a 30-year period.[11]

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ports to represent a majority of the shareholders of Long Beach, the position which the Committee takes in this litigation is obviously adverse to the interest of all of the shareholders, comprising an overwhelming majority, who stand to gain by the restrictive distribution provisions of the merger agreement, and stand to lose by the pro rata distribution provisions of the judgments under review. In this litigation, then, the Committee (and Long Beach, since it joins in the Committee's position) actually occupy the status, or represent the interests, of minority shareholders challenging the terms of the approved merger agreement."

[11] The court of appeals did not reach petitioners' contentions that the restrictive distribution provisions of the merger agreement were invalid. These contentions are without merit.

(1) Petitioners assert that the merger was governed by the sixth proviso of the second unnumbered paragraph of Section 5(i) of the Act (12 U.S.C. 1464(i)). The court of appeals correctly recognized (Ross Pet. App. A 11–13) that this provision, which deals with the conversion of a federal mutual association into a State mutual association, has no application to the transaction involved here—the *merger* of a federal mutual association into a State *stock* association.

(2) Petitioners assert that the merger provisions conflict with the charter requirement of pro rata distribution. The case authority indicates, however, that the provision for pro rata distribution in Section 9 of the Long Beach charter (Exh. 19, 6)—which deals with "liquidation, dissolution, or winding up of the association"—does not apply to its "merger" into another association, see *Windhurst* v. *Central Leather Co.*, 105 N.J. Eq. 621, 153 Atl. 402; *Adams* v. *United States Distributing*

2. The holding of the court below that petitioners' claim was barred by laches is clearly correct, and there is no occasion for further review by this Court.

The court of appeals pointed out (Ross Pet. App. A 19, 21) that although the petitioners had full knowledge of the merger agreement "from at least the middle of June, 1963," they "deliberately wait[ed] with their law suits until after the merger had been consummated * * * to confront the court with an accomplished fact which would enable them to test the validity of the distribution provisions without interfering with the consummation of the merger." Petitioners disregarded their opportunity to obtain judicial review of the distribution provisions prior to

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Corp., 184 Va. 134, 34 S.E. 2d 244. And in all events, it is well established that merger terms may override charter provisions if they meet the test of fairness. *Clarke* v. *Gold Dust Corp.*, 106 F. 2d 598 (C.A. 3), certiorari denied, 309 U.S. 671; *Langfelder* v. *Universal Laboratories*, 68 F. Supp. 209 (D. Del.), affirmed, 163 F. 2d 804 (C.A. 3).

(3) In approving the merger, the Board found that the distribution provisions were "fair and equitable" and "in the interest of all concerned" (Exh. C–56). Although the factual issue of fairness was not before the lower courts, the Board's finding was fully warranted. See *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–287; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207–209; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 145–146; *Adams* v. *Nagle*, 303 U.S. 532, 540–541, 543–544. Moreover, there was no denial of procedural due process. Since the Board's action was merely an approval of a proposed merger, the adjudicatory provisions of the Administrative Procedure Act requiring a formal hearing, 5 U.S.C. (Supp. II) 554, are of course inapplicable. Cf. *Bridgeport Fed. Sav. & L. Ass'n.* v. *Federal Home Loan Bank Board*, 307 F. 2d 580 (C.A. 3); *Federal Home Loan Bank Board* v. *Rowe*, 284 F. 2d 274 (C.A.D.C.).

the consummation of the merger.[12] In view of petitioners' untimely challenge, the court below found that the "substantial rights" of Long Beach and Equitable shareholders would be prejudiced, and "turmoil, uncertainty and delay" would ensue, if the merger agreement as a whole or the distribution provisions were set aside (Ross Pet. App. A 19–21). The court's conclusion that laches barred any relief to the petitioners was fully justified.[13]

Petitioners cite *Fahey* v. *Mallonee*, 332 U.S. 245, 257, in support of their contention that they could not challenge the validity of the merger agreement until after its consummation. But *Mallonee* held only that there was no basis to issue an injunction when there was not even a "threat" to merge. In the present case, however, there was nothing "hypothetical" about the merger. Similarly, there is no substance to petitioners' assertion that all parties, including the Board, agreed that the test of the validity of the merger agreement was to take place after consummation (Elliott Pet. 39 n. 43). As the court below observed (Ross Pet. App. A 15 n. 23), the Board's May 30, 1963 letter to Long

[12] Petitioners' assertion that the requirement of a bond made injunctive relief an illusory remedy is based on sheer conjecture. Assuming that the district court, in its discretion, would have required a bond, the government would certainly not have insisted upon a bond in a burdensome amount.

[13] The cases cited in the Elliott petition (pp. 40–41) either do not deal with laches (*e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426), or make clear that an attack on corporate action should precede consummation (*e.g.*, *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 489).

Beach (Exh. C–44) set forth its position with respect to any judicial challenge to the merger plan; that letter refutes the suggestion that there was an agreement of the type alleged by petitioners.

3. Finally, the distribution problem involved in the present case is of relatively limited significance in the savings and loan industry. Petitioners erroneously imply (Elliott Pet. 4–5, 24–25) that all mergers or conversions of federal mutual associations into other savings and loan associations necessarily result in a distribution, in some form, of the federal association's net worth to its shareholders. In fact, a distribution of net worth never occurs when mutual associations merge; it can only occur in the limited number of cases when a federal mutual association is merged or converted into a state-chartered, permanent stock association.[14] Since 1945, the Board has approved approximately twenty mergers and conversions from mutual to state-chartered permanent stock associations. Only

[14] The net worth of a mutual association is owned by its shareholders-depositors, while the net worth of a permanent stock association is owned by the holders of the permanent stock. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 150. Thus, when mutual associations merge there is no distribution of net worth, since the shareholders of the disappearing association necessarily acquire an equivalent ownership interest in the combined net worth of the resulting association. On the other hand, when a mutual association is merged into a permanent stock association, as in the instant case, there must be a distribution of the net worth of the mutual association to its shareholders, or else the owners of the permanent stock of the resulting association would obtain a windfall to the extent of the net worth of the mutual association.

in the instant case has the distribution problem given rise to litigation. Since December 1963, moreover, the Board has imposed a moratorium on approval of such mergers pending the completion of studies of the subject, including the problem of protecting the bona fide shareholders from speculative attempts to impair their interest in the mutual association's net worth.[15] See Scott and Hester, *Conversion of Mutual Savings and Loan Associations to Stock Form: Legal and Economic Issues* (Federal Home Loan Bank Board, December 1967). In May 1966, Congress authorized a complete study of the savings and loan industry (P.L. 89–426, 80 Stat. 143), scheduled for completion in December 1968, which may lead to legislation or regulations to eliminate the distribution problem involved in the present litigation.

[15] The Board subsequently approved at least two mergers of a federal mutual association into a stock association where the former had a negative net worth and there was nothing available for distribution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF INTERVENOR N. JOSEPH ROSS IN SUPPORT OF PETITION.

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REPLY BRIEF OF INTERVENOR N. JOSEPH ROSS IN SUPPORT OF PETITION.

Preliminary.

The brief of the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation (hereafter "Bank Board") in opposition to the Petition of Intervenor N. Joseph Ross for Certiorari (hereafter the "Ross Petition") fails to meet the thrust of the Petition.

Three of the four questions presented, and one of the two reasons relied on for granting the writ, are ignored completely or glossed over in a cavalier fashion. Instead the Bank Board hurls a variety of adjectives at the shareholder depositors which are not only irrelevant

here but assume matters which were never tried in the courts below or in any administrative proceeding. The present reply is designed to put the matter in proper focus.

I.

The Excluded Shareholder Members of Long Beach, Including Intervenor Ross, Have Been Deprived of Procedural Due Process.

One of the fundamental questions raised in the Ross Petition was whether members of a federally chartered savings and loan association can be deprived of their pro rata share of stock received upon a merger without advance notice, an administrative hearing, or judicial review (See Ross Petition, p. 15, question II and pp. 24-28).

The Bank Board's response does not even address itself to this question.

As noted in the Ross Petition (pp. 24-25):

1. The Long Beach shareholders were not notified at the time of their deposits that in the event of a merger they would not receive their pro rata share.

2. The Bank Board did not hold any hearing at which findings were made to justify exclusion of certain of the shareholder members of Long Beach.

3. No plenary trial has been held in the District Court to test the Board's action, while the Court of Appeals itself assumes for purposes of its decision that the exclusionary clauses were invalid.

In short, a large group of shareholder depositors have been deprived of valuable property interests without

any opportunity for either an administrative or court hearing.

Nor is it any answer to this lack of due process to suggest that the excluded shareholders were "speculators" or receiving a "windfall". Certainly the right to due process does not depend upon any preconceived notion of the governmental agency involved as to the supposed "guilt" of an alleged offender.

II.

The Bank Board Ignores the Effect of the Severability Clause in the Merger Agreement.

Like "Hamlet without the Prince", the Bank Board's brief conveniently buries in a footnote one of the central facts in the present case, namely that by the express terms of the Merger Agreement, the excluded shareholder members were led to believe that their right to challenge the exclusionary clauses would be preserved. Thus, the Merger Agreement recites:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach or *any part thereof*, incorporated herein." (Emphasis added) [Pltf. Ex. 12/9/63-10A, p. 47].

In the face of this express severability clause, the Bank Board's reliance on shareholders' approval of the merger is misplaced. As the Court of Appeals itself notes (C.A. Opinion, p. 7):

> "Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon" the foregoing language in the Merger Agreement (See Ross Petition, p. 11, footnote 12).

III.

The Bank Board Ignores the Effect of the Administrative Procedure Act.

As pointed out in the Ross Petition (pp. 20-21), the Administrative Procedure Act is applicable to the Bank Board and clearly contemplates *effective judicial review* of the Board's action. Yet the Court of Appeals' opinion precludes any effective review of the Board's action.

IV.

The Impact of the Court of Appeals' Opinion.

The Court of Appeals' opinion goes beyond the holdings described in the Bank Board's brief. The Court of Appeals not only holds that the federal courts are without power to review or nullify an invalid provision of a merger agreement without setting aside the entire merger, but likewise holds that *the Bank Board itself is powerless to remedy the situation once the merger has been approved and consummated.* (C.A. Opinion, p. 20).

The Bank Board also ignores the practical effect of the Court of Appeals' decision. By foreclosing a post-merger challenge to the distribution provisions, the decision below places the courts in a position where they must either:

1. Increase the vulnerability of mergers to shareholder attack—a course which may invite a rash of "strike suits"; or

2. Routinely reject such attacks, thereby depriving the injured shareholder of the only recourse ostensibly open to him.

Thus the excluded shareholders and the District Court are placed in a procedural straight jacket whereby they must choose between two highly undesirable alternatives without being able to adopt a feasible middle course.

The Bank Board's brief also ignores the effect of the Court of Appeals' over-extension and misapplication of the decisions of this Court in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767 (1947); and *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Of particular importance here is the failure of the Court of Appeals to give due recognition to the effect of the severability clause under the *Idaho Power* case. (See Ross Petition, p. 23).

V.

The District Court Did Not Revise the Terms of Distribution.

The District Court did not revise the distribution clause of the Merger Agreement but was merely enforcing the terms of the Long Beach Charter and the mandate of Congress, both of which were deemed to require pro rata distribution of the Equitable Stock among the Long Beach depositors.

VI.

Re Bank Board's Contentions on the Merits.

1. The Bank Board's claims as to the "fairness" of its action and its characterization of excluded shareholders as "speculators", recipients of a "windfall", etc., *assume facts which have never been heard or tried in any administrative or court hearing, let alone deter-*

mined in the Bank Board's favor. Nor did the Court of Appeals rest its decision on this ground.

Certainly the excluded shareholders, including Intervenor Ross, are entitled to a hearing on these questions; the Bank Board's assumptions "that generally new accounts would not be opened by bona fide savers in amounts larger than $10,000 in any one account" (Bank Board's Brief, p. 6, footnote 5) and that a depositor who was forced to pledge his account to a lender was somehow guilty of wrongdoing, should at least be subject to challenge.[1]

2. The Bank Board's brief ignores some of the principal grounds relied on by the District Court:

(a) The effect of 12 U.S.C. §1464(a), which requires *all* federal savings and loan associations to be *mutual* (Ross Petition, p. 8).[2]

(b) The Bank Board cannot forfeit the interests of the shareholder members by *an edict issued after their deposits were made and without prior notice* (Ross Petition, p. 9).

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[1]While noting that the majority of savings and loan *accounts* have balances under $10,000.00, the Bank Board conveniently ignores the fact that savings and loan associations throughout the United States average over 31.4 percent of their *savings deposits* in accounts of more than $10,000.00 each (See Elliott Petition (No. 1118), p. 15, note 17).

[2]The Bank Board's brief itself acknowledges (p. 13, footnote 14) that "when a mutual association is merged into a permanent stock association, as in the instant case, *there must be a distribution of the net worth of the mutual association to its shareholders* . . ." (Emphasis added.) Yet in the present case, the Bank Board excluded a substantial segment of the shareholders of Long Beach Federal—a *mutual* association—from participation in the net worth of the association.

VII.

Importance of Case.

Contrary to the Bank Board's assertion, the present case has importance transcending even the fate of the thousands of Long Beach shareholder depositors directly affected by the Court of Appeals' opinion.

The erroneous principles announced by the Court of Appeals, and its misapplication of decisions of this Court, *can readily be applied to other areas of administrative action,* with equally drastic and unjust results.

Insofar as the Bank Board contends that there has been no litigation in this area in the past, that stems from the fact that neither the Bank Board *nor the appellate courts have heretofore adopted such a course of conduct as is evidenced in the instant case.* If the Court of Appeals' opinion is permitted to stand, it will serve as *an invitation to similar administrative abuses* and may well lead to a rash of future litigation.

Nor is it any answer for the Bank Board to suggest that it is presently conducting studies which may result in *future legislation or regulations in this area.* Even if such regulations or legislation—the specifics of which are not even suggested in the Bank Board's brief —are adopted, *they will not serve to remedy the obvious lack of due process in the present case.* Intervenor Ross and the other shareholder depositors of Long Beach Federal were entitled to be dealt with under *existing law* and *not on the basis of the Bank Board's hind-*

sight or of regulations or legislation which *did not exist when they made their deposits* and does not exist even at this late date.

Conclusion.

The Bank Board has not, and presumably cannot, answer the basic questions raised in the Ross Petition. We submit that those questions are of sufficient importance to warrant consideration by this Court, and again respectfully urge that the Petition be granted.

Respectfully submitted,

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